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THE CODE OF CIVIL PROCEDURE

OF THE

STATE OF MONTANA. [illegible]

Reported by the Code Commission.

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Code of Civil Procedure.

IN FIVE PARTS.

Part I. Courts of Justice.
" II. Civil Actions.
" III. Special Proceedings of a Civil Nature.
" IV. Evidence.
" V. Definitions and General Provisions.

An Act to Establish a

CODE OF CIVIL PROCEDURE.

Be it enacted by the Legislative Assembly of the State of Montana.

TITLE OF ACT.

Section 1. Title and division of this volume.

Section 1. This Act shall be known as the Code of Civil Procedure of Montana, and is divided into five parts, as follows:

Part I. Courts of Justice.
Part II. Civil Actions.
Part III. Special Proceedings of a Civil Nature.
Part IV. Evidence.
Part V. Definitions and General Provisions.

PART I.

COURTS OF JUSTICE.

TITLE I.

ORGANIZATION AND JURISDICTION.

Chapter I. Courts of Justice in General.
" II. Court of Impeachment.
" III. Supreme Court.
" IV. District Courts.
" V. Justices' Courts.
" VI. Police Courts.
" VII. General Provisions Respecting Courts of Justice.

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

Section 2. The several courts of this State.
" 3. Courts of record.

Sec. 2. The following are courts of justice of this State:
1 The Court of Impeachment.
2. The Supreme Court.
3. The District Courts.
4. The Justices' Courts.
5. The police courts, and such other inferior courts as the Legislative Assembly may establish in any incorporated city or town.

Sec. 3. The courts enumerated in the first three subdivisions of the last preceding section, and only those courts are courts of record.

CHAPTER II.

COURT OF IMPEACHMENT.

Section 6. Members of the court.
" 7. Jurisdiction.
" 8. Officers of the court.
" 9. Trial of impeachments provided for in the Penal Code.

Sec. 6. The Court of Impeachment is the Senate; when sitting as such court, the senators must be upon oath or affirmation. No person shall be convicted without a concurrence of two-thirds of the senators elected.

Sec. 7. The court has jurisdiction to try impeachments, when presented by the House of Representatives, of the Governor and other State and judicial officers, except justices of the peace, for high crimes and misdemeanors or malfeasance in office.

Sec. 8. The officers of the Senate are officers of the court.

Sec. 9. Proceedings on trial of impeachments are provided for in the Penal Code.

CHAPTER III.

SUPREME COURT.

Section 12. Justices, elections, and terms of office.
" *13. Computation of years of office.*
" *14. Vacancies.*
" *15. Who shall preside.*
" *16. Terms of Supreme Court, etc.*
" *17. Decisions to be in writing.*
" *18. Jurisdiction.*
" *19. Original jurisdiction.*
" *20. Appellate.*
" *21. Powers in appealed cases.*
" *22. Concurrence necessary.*
" *23. Pending appeal Supreme Court may continue injunction, and may grant injunctions when rights of the public require.*

Sec. 12. The Supreme Court consists of a chief justice and two associate justices, who shall be elected by the qualified electors of the State at large, at the general State elections next preceding the expiration of the terms of office of their predecessors respectively, and hold their offices for the term of six years from and after the first Mondays of January next succeeding their election; *provided*, that of the justices elected at the general State election of 1889, the chief justice shall go out of office on the first Monday of January, 1893, and the two associate justices shall go out of office on the first Mondays of January, 1895 and 1897, respectively.

Sec. 13. The years during which a justice of the Supreme Court is to hold office are to be computed respectively from and including the first Monday of January of any one year to and excluding the first Monday of January of the next succeeding year.

Sec. 14. If a vacancy occur in the office of a justice of the Supreme Court, the Governor must appoint an eligible person to hold the office until the election and qualification of a justice to fill the vacancy, which election must take place at the next succeeding general election; and the justice so elected holds the office for the remainder of the unexpired term of his predecessor.

Sec. 15. The chief justice presides at all sessions of the Supreme Court, and in case of his absence, the associate justice having the shortest term to serve presides in his stead. A majority of the justices is necessary to form a quorum or pronounce a decision, but one or more of the justices may adjourn the court from day to day or to a day certain.

Sec. 16. Four terms of the Supreme Court must be held each year at the seat of government, commencing on the first Tuesdays of March, June, October and December. The chief justice or any two justices has power to call a special term at any time. If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not provided by the State, together with attendants, furniture, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court, or any two justices thereof, may direct the clerk of the Supreme Court to provide such rooms, attendants, furniture, lights, fuel and stationery; and the expenses thereof, certified by any two justices to be correct, must be paid out of the State treasury, out of any funds in the State treasury not otherwise appropriated.

Sec. 17. In the determination of causes, all decisions of the Supreme Court must be given in writing, and the grounds of the decision must be stated.

Sec. 18. The jurisdiction of the Supreme Court is of two kinds:

1. Original; and,
2. Appellate.

Sec. 19. In the exercise of its original jurisdiction the Supreme Court has power to issue writs of mandamus, certiorari, prohibition, injunction, and *habeas corpus*; also has power to issue all other writs necessary and proper to the complete exercise of its appellate jurisdiction.

Sec. 20. The appellate jurisdiction of the Supreme Court extends to all cases at law and in equity.

Sec. 21. The Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceeedings to be had. The decision of the court must be given in writing and a syllabus thereof must be prepared by the court and filed with the opinion; and in giving its decision, if a new trial be granted, the court must pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases must be remitted to the court from which the appeal was taken.

Sec. 22. The concurrence of two justices of the Supreme Court is necessary for the issuance of any writ, or the transaction of any business, except such as can be done at chambers; *Provided*, That each of the justices has power to issue writs of *habeas corpus* to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or judge thereof, or before any District Court in the State, or any judge thereof.

Sec. 23. The Supreme Court may continue in force an injunction order made by a District Court, or judge, or grant an injunction order and writ pending an appeal to the Supreme Court from an order of a District Court, or judge, refusing or dissolving an injunction, upon such terms and under such rules as the Supreme Court may establish. No action to obtain an injunction must be commenced in the Supreme Court, except in cases where the State is a party, or in which the public is interested, or the rights of the public are involved, but the proper District Court has jurisdiction of all injunctions, and the commencement of all actions therefor, except as in this section provided. The Supreme Court may provide rules for the commencement and trial of actions for injunctions in that court.

CHAPTER IV.

DISTRICT COURTS.

Section 25. Districts.
" *26. Election and terms of judges.*
" *27. Terms of office.*
" *28. Computation of years of office.*
" *29. Vacancy.*
" *30. District Courts by judges of other counties.*
" *31. Judges pro tempore.*
" *32. Sessions and terms.*
" *33. Adjournments.*
" *34. Jurisdiction of two kinds.*
" *35. Original jurisdiction.*
" *36. Appellate jurisdiction.*
" *37. Process.*
" *38. Additional judges in a district, their duties and powers.*

Sec. 25. In this State there are ten judicial districts, constituted as follows: First district, Lewis and Clarke county; Second district, Silver Bow county; Third district, Deer Lodge county; Fourth district, Missoula county; Fifth district, Beaverhead, Jefferson and Madison counties; Sixth district, Park and Meagher counties; Seventh district, Yellowstone, Custer and Dawson counties; Eighth district, Cascade county; Ninth district, Gallatin county; Tenth district, Choteau and Fergus counties.

Sec. 26. In each judicial district there must be a judge of the District Court, and who must be elected by the qualified electors of the district, and whose term of office is four years, except that the district judges elected on the first day of

October, 1889, hold their office until the first Monday of January, 1893. In the First and Second districts there must be two judges in each district who hold office until the first Monday of January, 1893.

Sec. 27. The term of office of judges of the District Court begins on the first Monday of January next succeeding their election.

Sec. 28. The years during which a judge of a District Court is to hold office are to be computed respectively from and including the first Monday of January of any one year to and excluding the first Monday of January, of the next succeeding year.

Sec. 29. If a vacancy occur in the office of judge of a District Court, the Governor must appoint an eligible person to hold the office until the election and qualification of a judge to fill the vacancy, which election must take place at the next succeeding general election, and the judge so elected holds office for the remainder of the unexpired term.

Sec. 30. A judge of the District Court of any judicial district may hold the District Court in any county of another district than his own, at the request of the judge thereof, and, upon the request of the Governor, it is his duty to do so; and in either case the judge holding the court has the same power either in court or chambers as a judge thereof.

Sec. 31. A civil action in the District Court may be tried by a judge *pro tempore*, who must be a member of the bar of the State, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause; and in such case any order, judgment or decree, made or rendered therein by such judge *pro tempore*, shall have the same force and effect as if made or rendered by the court with the regular judge presiding. A judge *pro tempore* shall, before entering upon his duties, be sworn to try the cause.

Sec. 32. The District Court of each county which is a judicial district by itself has no terms, but must be always open for the transaction of business, except on legal holidays and non-judicial days, and must hold its sessions at the county seat. Juries for the trial of causes must be called on the first Monday of every alternate month, if the judge so direct, and oftener, if public business requires. In each district where two or more counties are united, the judge thereof must fix the terms of court in each county in his district, which must be held at the county seat, and there must be at least four terms a year in each county. The judge of such District Court must, within ten days after the taking effect of this Code, and thereafter, within ten days after the first day of January in each year, make an order which must designate the times at which the terms of court are to be held in each county in his district during the year, and must cause said order, or a copy thereof, to be filed in the office of the clerk of the District Court in each county in his district, and such clerk must cause the same to be published in some newspaper printed in his county, once a week for four successive weeks, immediately after the filing of such order, the cost of which shall be a county charge, and no change in the time of holding the terms so fixed in any county must be made during the year. A district judge may adjourn a term of court in one county to a future day certain, and in the meantime hold court in another county.

Sec. 33. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions or terms, and shall not prevent the court from sitting at any time.

Sec. 34. The jurisdiction of the District Court is of two kinds:

1. Original; and,
2. Appellate.

Sec. 35. The District Court has original jurisdiction in all cases at law and in equity, including all cases which involve the title or right of possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all cases in which the debt, damage, claim or demand, exclusive of interest, or the value of the property in controversy exceeds fifty dollars; and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for; of actions of forcible entry and unlawful detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate; of actions of divorce, and for annullment of marriage, and for all such special actions and proceedings as are not otherwise provided for. And such courts have the power of naturalization, and to issue papers therefor, in all cases where they are authorized to do so by the laws of the United States. Said courts and judges thereof have power also to issue, hear and determine writs of mandamus, quo warranto, certiorari, prohibition, injunction and other original remedial writs, and also all writs of *habeas corpus*, on petition by, or on behalf of any person held in actual custody in their respective districts. Injunctions, writs of prohibition and *habeas corpus*, may be issued and served on legal holidays and nonjudicial days.

Sec. 36. The District Court has appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective districts, as may be prescribed by law, and consistent with the Constitution.

Sec. 37. The process of the District Court extends to all parts of the State, provided that all actions for the recovery of, the possession of, quieting the title to, or the enforcement of liens upon real property, must be commenced in the county in which the real property, or any part thereof, affected by such action or actions, is situated.

Sec. 38. Whenever the number of judges in any judicial district is increased by the addition of one or more judges, the judges of such court may hold as many sessions or terms of said court at the same time as there are judges thereof, and must apportion the business among themselves as equally as may be. They may divide the court into departments, prescribe the order of business, and make any rules for the government of such court, not inconsistent with the Constitution or laws of the State, as may seem proper.

The salaries of such additional judges are the same in amount, and must be paid in the same manner as the salaries of other judges of the District Court in such district.

CHAPTER V.

JUSTICES' COURTS.

Section *40.* *Justices' courts and justices.*
" *41.* *Courts, where held.*
" *42.* *What justice may hold court for another.*
" *43.* *Territorial extent of civil jurisdiction.*
" *44.* *Terms of office.*
" *45.* *Vacancies.*
" *46.* *Civil jurisdiction.*
" *47.* *Concurrent jurisdiction.*
" *48.* *Criminal jurisdiction.*

Sec. 40. There must be at least two justices' courts in each of the organized townships of the State, for which two justices of the peace must be elected by the qualified electors of the township at the general State election next preceding the expiration of the term of office of his predecessor.

Sec. 41. A justice's court may be held at any place selected by the justice holding the same, in the township for which he is elected or appointed ; and such court is always open for the transaction of business, except on legal holidays and non-judicial days.

Sec. 42. A justice of the peace of any township may hold the court of any other justice of the peace of the same county at his request, and while so acting is vested with the power of the justice for whom he so holds court, in which case the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice for whom he so holds the court.

Sec. 43. The civil jurisdiction of justices' courts extends to the limits of the townships in which they are held; but mesne and final process of any justice's court in a county may be issued to and served in any part of the county.

Sec. 44. The term of office of justices of the peace is two years from the first Monday of January next succeeding their election; *Provided*, That all justices of the peace elected at the general election of 1889 shall go out of office on the first Monday of January, 1893.

Sec. 45. If a vacancy occurs in the office of a justice of the peace, the county commissioners of the county must appoint an eligible person to hold the office for the remainder of the unexpired term.

Sec. 46. The justices' courts have civil jurisdiction:

1. In actions arising on contract for the recovery of money only if the sum claimed does not exceed three hundred dollars.

2. In actions for damages for injury to the person, or for taking, detaining, or injuring personal property, or for injury to real property, where no issue is raised by the verified answer of the defendant involving the title to or possession of the same, if the damages claimed do not exceed three hundred dollars.

3. In actions to recover the possession of personal property, if the value of such property does not exceed three hundred dollars.

4. In actions for a fine, penalty, or forfeiture, not exceeding three hundred dollars, given by statute, or the ordinance of an incorporated city, or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine.

5. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed does not exceed three hundred dollars, though the penalty may exceed that sum.

6. To take and enter judgment for the recovery of money on the confession of a defendant, when the amount confessed does not exceed three hundred dollars.

Sec. 47. The justices' courts have concurrent jurisdiction with the District Courts within their respective townships, in actions of forcible entry and unlawful detainer.

Sec. 48. The justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established.

1. Petit larceny.

2. Assault in the third degree, as defined in Section 240, of the Penal Code.

3. Breaches of peace, riots, routs, affrays, committing a willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.

CHAPTER VI.

POLICE COURTS.

Sec. 50. Police courts are established in incorporated cities and towns, and their organization, jurisdiction, and powers are provided for in the Political Code.

CHAPTER VII.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

Article I. Publicity of Proceedings.
" *II. Incidental Powers and Duties of Courts.*
" *III. Judicial Days.*
" *IV. Proceedings in Case of Absence of Judge.*
" *V. Provisions Respecting Places of Holding Courts.*
" *VI. Seals of Courts.*

ARTICLE I.

PUBLICITY OF PROCEEDINGS.

Section 55. Sittings, public.
" *56. Sittings, when private.*

Sec. 55. The sittings of every court of justice must be public, except as provided in the next section.

Sec. 56. In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and exclude all persons except the officers of the court, the parties, their witnesses, and counsel: *Provided*, That in any cause the court may, in the exercise of a sound discretion, during the examination of a witness, exclude any or all witnesses in the cause.

ARTICLE II.

INCIDENTAL POWERS AND DUTIES OF COURTS.

Section 58. Powers respecting conduct of business.
" *59. Courts of record may make rules.*
" *60. When rules take effect.*

Sec. 58. Every court has power :

1. To preserve and enforce order in its immediate presence.

2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.

3. To provide for the orderly conduct of proceedings before it or its officers.

4. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein.

5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this Code.

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties.

8. To amend and control its process and orders so as to make them conformable to law and justice.

Sec. 59. Every court of record may make rules not inconsistent with the laws of this State, for its own government and the government of its officers; but such rules must not impose any tax or charge upon any legal proceeding, or give any allowance to any officer for services.

Sec. 60. Rules adopted by any court take effect thirty days after their publication.

ARTICLE III.

JUDICIAL DAYS.

Section 63. Days on which courts, etc., may be held.
" 64. Non-judicial days.
" 65. Appointments on non-judicial days.

Sec. 63. Courts of justice may be held and judicial business transacted on any day, except as provided in the next section.

Sec. 64. No court must be open, nor must any judicial business be transacted on Sunday, on the first day of January, on the twenty-second day of February, on the fourth day of July, on the twenty-fifth day of December, on the thirtieth of May, day, on the first Monday of September, on a day on which an election is held throughout the State, on a day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving, or holiday, except for the following purposes:

1. To give, upon their request, instructions to a jury when deliberating on their verdict.

2. To receive a verdict, or discharge a jury.

3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature; but injunctions, writs of prohibition and *habeas corpus* may be issued and served on any day.

Sec. 65. If any day mentioned in the last section happen to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it must be considered appointed for or adjourned to the next day.

ARTICLE IV.

PROCEEDINGS IN CASE OF ABSENCE OF JUDGE.

Section 67. Adjournment for absence of judge.
" 68. Adjournment till next regular session.

Sec. 67. If no judge attend on the day appointed for the holding or sitting of a court, or on a day to which it may have been adjourned, before noon, the sheriff or clerk may adjourn the same, until the next day, at ten o'clock A. M., and if no judge attend on that day, before noon, the sheriff or clerk may adjourn the same until the following day, at the same hour, and so on, from day to day for six days, unless the judge, by written order or telegram, directs it to be adjourned to some day certain, fixed in said order or telegram, in which case it must be so adjourned.

Sec. 68. If no judge attend for six days, and no written order or telegram be made or sent, as provided in the last section, the sheriff or clerk must adjourn the term until the time appointed for the holding of the next regular term.

ARTICLE V.

PROVISIONS RESPECTING PLACES OF HOLDING COURTS.

Section 70. Change in certain cases of place of holding court.
" *71. Parties to appear at place appointed.*
" *72. When sheriff to provide court rooms, etc.*

Sec. 70. The judge of the District Court authorized to hold or preside at a court appointed to be held at a particular place, may, by an order filed with the clerk, and published as he may prescribe, direct that the court be held or continued at any other place in the county than that appointed, when war, insurrection, pestilence, or other public calamity, or the danger thereof, or the destruction or danger of the public building appointed for the holding the court, may render it necessary; and may, in the same manner, revoke the order, and in his discretion, appoint another place in the same county for holding the court.

Sec. 71. When the court is held at the place appointed, as provided in the last section, every person held to appear at the court must appear at the place so appointed.

Sec. 72. If suitable rooms for holding the District Court and chambers of the judge of said court be not provided in any county, by the Board of County Commissioners thereof, together with the attendants, furniture, fuel, lights, and stationery, sufficient for the transaction of business, the court or the judge thereof, may direct the sheriff of the county to provide such rooms, attendants, furniture, fuel, lights and stationery; and the expenses incurred, certified by the judge to be correct, are a charge against the county treasury, and must be paid out of the general fund thereof.

ARTICLE VI.

SEAL OF COURTS.

Section 75. *What courts have seals.*
" 76. *Seal of Supreme Court.*
" 77. *Seals of District Courts.*
" 78. *Clerk of court to keep seal.*
" 79. *Seals of courts, to what documents affixed.*

Sec. 75. Each of the following courts shall have a seal:

1. The Supreme Courts.
2. The District Courts.

Sec. 76. The seal of the Supreme Court is circular in form and not less than one and three-fourths inches in diameter, on which is engraved the words "Supreme Court, State of Montana," with the word "Seal" in the center thereof, which seal must be procured by the clerk of the Supreme Court at the expense of the State, and an impression thereof, certified to by the clerk, must be filed with the Secretary of State.

Sec. 77. The seals of the District Courts are circular, not less than one and three-fourths inches in diameter, and having in the center the word "Seal" and the following inscription surrounding the same: "——— District Court ——— County, Montana" inserting the number of the district and the name of the county, which seal must be procured by the clerk of the court at the expense of the county, and an impression thereof, certified by the said clerk, filed with the Secretary of State.

Sec. 78. The clerk of the court must keep the seal thereof.

Sec. 79. The seal of a court need not be affixed to any proceeding therein or document, except:

1. To a writ.
2. To the certificate of probate of a will, or of the appointment of an executor, administrator, or guardian.
3. To the authentication of a copy of a record, or other proceeding of a court or of an officer thereof, or of a copy of a document on file in the office of the clerk.

TITLE II.

JUDICIAL OFFICERS.

Chapter I. *Judicial Officers in General.*
" II. *Powers and Duties of Judges at Chambers.*
" III. *Disqualifications of Judges.*
" IV. *Incidental Powers and Duties of Judicial Officers.*
" V. *Miscellaneous Provisions Respecting Courts and Judicial Officers.*

CHAPTER I.

JUDICIAL OFFICERS IN GENERAL.

Section 83. Qualifications of justices of Supreme Court.
" 84. Qualifications of district judges.
" 85. Residence of district judges.
" 86. Residence and qualification of justices of the peace.
" 87. Judges holding District Courts at request of Governor.

Sec. 83. No person shall be eligible to the office of justice of the Supreme Court unless he shall have been admitted to practice law in the Supreme Court of the Territory or State of Montana, be at least thirty years of age, and a citizen of the United States, nor unless he shall have resided in the State at least two years next preceding his election.

Sec. 84. No person shall be eligible to the office of judge of the District Court unless he be at least twenty-five years of age, and a citizen of the United States, and shall have been admitted to practice law in the Supreme Court of the Territory or State of Montana, nor unless he shall have resided therein at least one year next preceding his election. He need not be a resident of the district for which he is elected at the time of his election, but after his election he shall reside in the district for which he is elected during his term of office.

Sec. 85. Each district judge must reside at some county seat in his district.

Sec. 86. Every justice of the peace must reside in the township in which his court is held, and no person is eligible to the office of justice of the peace unless he shall have been a citizen of the United States and a resident of the county, in which he is to serve, for one year next preceding his election or appointment.

Sec. 87. If, by reason of sickness, absence, disability, or other cause, a District Court cannot be held in any county by the judge thereof, or by a district judge, requested by him to hold such court, a certificate of that fact must be transmitted by the clerk thereof to the Governor, who may thereupon require some district judge to hold such court.

CHAPTER II.

POWERS OF JUDGES AT CHAMBERS.

Section 90. Powers of justices of Supreme Court at chambers.
" 91. Powers of district judges at chambers.

Sec. 90. Each of the justices of the Supreme Court shall have power to issue writs of *habeas corpus* to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or the Supreme Court, or before any District Court of the State or any judge thereof; and such writs may be heard and determined by the justice or court, or judge, before whom they are made returnable. Each of the justices of the Supreme Court may also issue and hear and determine writs of *certiorari* in proceedings for contempt in the District Court.

Sec. 91. The judge of the District Court may at chambers issue, hear and determine writs of *mandamus*, *quo warranto*, *certiorari*, prohibition, injunction and other original and remedial writs, and also all writs of *habeas corpus* on petition by, or on behalf of, any person held in actual custody in his district, and grant all orders and writs which are usually granted in the first instance upon an *ex parte* application, and, at chambers, hear and dispose of such orders and writs; and may also, at chambers, make any order, issue any process, and hear and determine any matter necessary in the exercise of his powers in matters of probate, or in any action or proceeding provided by law. If a jury is necessary the judge may open court and obtain a jury as in other cases.

CHAPTER III.

DISQUALIFICATIONS OF JUDGES.

Section 93. Disqualifications to sit or act.
" 94. Certain judges not to practice law.
" 95. No judicial officer to have partner practicing law.
" 96. Judges not to act in certain cases after term has expired.

Sec. 93. No justice, judge, or justice of the peace, must sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested.

2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to the rules of law.

3. When he has been attorney or counsel for either party in the action or proceeding, or when he rendered or made the judgment order or decision appealed from.

But the provisions of this section shall not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the action or proceeding to some other court.

Sec. 94. No justice, or a judge of a court of record, county clerk, or clerk of any court, or sheriff, must practice law in any court in this State, nor act as attorney, agent or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings before any department of the State or general government, or courts of the United States, during his continuance in office; nor must any justice of the peace practice law before any justice's court in the county in which he resides.

Sec. 95. No justice, judge, or other elective judicial official, must have a partner acting as attorney or counsel in any court of this State.

Sec. 96. A judge, after the expiration of his term of office, must not act as attorney or counsel in any action or special proceeding which has been before him in his official character.

CHAPTER IV.

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS.

Section 100. Powers of judges out of court.
" *101. Powers of judicial officers as to conduct of proceedings.*
" *102. To punish for contempt.*
" *103. To take acknowledgments and affidavits.*
" *104. Certificate of proof.*

Sec. 100. A justice or judge may exercise out of court all the powers expressly conferred upon a justice or judge, as contra distinguished from the court.

Sec. 101. Every judicial officer has power:

1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty.

2. To compel obedience to his official orders, as provided in this Code.

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this Code.

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

Sec. 102. For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this Code.

Sec. 103. Each of the justices of the Supreme Court and judges of the District Courts, has power in any part of the State, and every justice of the peace within his county, to take and certify:

1. The proof and acknowledgment of a conveyance of real property, or of any other written instrument.

2. The acknowledgment of satisfaction of a judgment of any court.

3. An affidavit or deposition to be used in this State.

Sec. 104. The certificate of proof or acknowledgment, if made before a justice of the peace, when used in any county other than that in which he resides, must be accompanied by a certificate under the hand and seal of the clerk of the county in which the justice resides, setting forth that such justice, at the time of taking such proof or acknowledgment, was authorized to take the same, and that the clerk is acquainted with his hand writing, and believes that the signature to the original certificate is genuine.

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

Section *106.* *Subsequent applications for orders refused, when prohibited.*
" *107.* *Violations of preceding section.*
" *108.* *Proceedings not effected by vacancy in office.*
" *109.* *Proceedings to be in English language.*
" *110.* *Abbreviations and figures.*
" *111.* *Means to carry jurisdiction into effect.*

Sec. 106. If an application for an order made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any other judge, except of a higher court; but nothing in this section refers to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same.

Sec. 107. A violation of the last section may be punished as a contempt; and an order made contrary thereto may be revoked by the judge who made it, or vacated by a judge of the court in which the action or proceeding is pending.

Sec. 108. No proceeding in any court of justice, in an action or special proceeding pending therein, is affected by a vacancy in the office of all or any of the judges thereof.

Sec. 109. Every written proceeding in a court of justice in this State must be in the English language, and judicial proceedings must be conducted, preserved, and published in no other.

Sec. 110. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.

Sec. 111. When jurisdiction is, by the Constitution or this Code, or any other statute, conferred on a court or judicial officer, all the means necessary to carry into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.

TITLE III.

PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE.

Chapter 1. Jurors.

CHAPTER I.

JURORS.

Article I. Jurors in General.
" *II. Qualifications and Exemptions of Jurors.*
" *III. Selecting and Returning Jurors for Courts of Record.*
" *IV. Drawing Jurors for Courts of Record.*
" *V. Summoning Jurors for Courts of Record.*
" *VI. Summoning Jurors for Courts not of Record.*
" *VII. Summoning Jurors of Inquest.*
" *VIII. Obedience to Summons, how enforced.*
" *IX. Impaneling Grand Juries.*
" *X. Impaneling Trial Juries in Courts of Record.*
" *XI. Impaneling Trial Juries in Courts not of Record.*
" *XII. Impaneling Juries of Inquest.*

ARTICLE I.

JURORS IN GENERAL.

Section 115. Jury defined.
" *116. Different kinds of juries.*
" *117. Grand jury defined.*
" *118. Trial jury defined.*
" *119. Number of a trial jury.*
" *120. Juries of justices' courts.*
" *121. Jury of inquest defined.*

Sec. 115. A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for public offense, or to try a question of fact.

Sec. 116. Juries are of three kinds:

1. Grand juries.
2. Trial juries.
3. Juries of inquest.

Sec. 117. A grand jury is a body of men, seven in number, returned in pursuance of law, from the citizens of a county, before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county.

Sec. 118. A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by verdict, a question of fact.

Sec. 119. A trial jury consists of twelve men; *Provided*, that in civil actions and cases of misdemeanor, it may consist of twelve, or any number less than twelve, upon which the parties may agree in open court.

Sec. 120. A jury in a justice's court, both in civil cases and misdemeanors, consists of six persons, but the parties may agree to a less number than six.

Sec. 121. A jury of inquest is a body of men summoned from the citizens of a particular district before the sheriff, coroner, or other ministerial officer, to inquire concerning particular facts.

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

Section 125. Who competent to act as juror.
" *126. Who not competent to act as juror.*
" *127. Who exempt from jury duty.*
" *128. Who may be excused.*
" *129. Affidavit of claim to exemption.*

Sec. 125. A person is competent to act as juror if he be:

1. A male citizen of the United States of the age of twenty-one and not more than seventy years, who shall have been a resident of the State one year, and of the county ninety days before being selected and returned.

2. In possession of his natural faculties, and of ordinary intelligence, and not decrepit.

3. Possessed of sufficient knowledge of the English language.

4. Assessed on the last assessment roll of the county on property belonging to him.

Sec. 126. A person is not competent to act as juror:

1. Who does not possess the qualifications prescribed by the preceding section; or,

2. Who has been convicted of malfeasance in office, or any felony or other high crime.

Sec. 127. A person is exempt from liability to act as juror if he be:

1. A judicial, civil or military officer of the United States, or of this State.

2. A person holding a county, township or town office.

3. An attorney at law in practice.

4. A minister of the gospel, or a priest of any denomination, or editor, following his profession.

5. A teacher in a university, college, academy or school.

6. A practicing physician or druggists actually engaged in the business of dispensing medicines.

7. An officer, keeper or attendent of an alms house, hospital, asylum or other charitable institution.

8. Engaged in the performance of duty as officer or attendant of the State prison, penitentiary, or of a county jail.

9. An express agent, mail carrier, superintendent, employe or operator of a telegraph line doing a general telegraph business in the State.

10. An active member of the National Guard of Montana, or an active member of a fire department of any city or town in this State. The number of firemen hereby exempted must not exceed twenty-eight, including officers for each company organized; and such members from each company must be selected from the roll of such company according to the seniority of membership, and a list containing the names of such persons must be made out by the secretary of each company and filed with the clerk of the Board of County Commissioners on the first Mondays of December, March June and September, and any failure to file the list hereby required is considered a waiver of such exemption.

11. A superintendent, engineer, or conductor on a railroad.

The court must discharge a person from serving as a trial juror, in either of the following cases :

Where it satisfactorily appears that he is not competent ; and,

Where it satisfactorily appears that he is exempt, and claims the benefit of the exemption.

Sec. 128. A juror must not be excused by a court for slight or trivial cause, or for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family requires his absence.

Sec. 129. If a person, exempt from liability to act as a juror, as provided in Section 127, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned, stating his office, occupation, or employment ; and such affidavit must be delivered by the clerk to the judge of the court where the name of such person is called, and if sufficient in substance, must be received as evidence of his right to exemption and as an excuse for nonattendance in person. The affidavit must then be filed by the clerk.

ARTICLE III.

SELECTING AND RETURNING JURORS.

Section 133. Jury lists, by whom and when to be made.
" 134. How selection shall be made.

Section 135. Lists delivered to clerk.
" *136. Duty of clerk; jury boxes.*
" *137. Same.*
" *138. Jurors to serve one year.*

Sec. 133. The chairman of the county commissioners, the county treasurer, and the county assessor, of each county, must meet at the county seat of each county at the office of the county clerk, on the second Monday of January of each year, for the purpose of making a list of persons to serve as trial jurors for the ensuing year. If they fail to meet on the day specified in this section, they must meet as soon thereafter as practicable. The first meeting of such officers for the purpose of making such list, is within ten days after this Code takes effect.

Sec. 134. At the meeting, specified in the last section, the officers present must select, from the last assessment roll of the county, and make a list of the names of all persons whom they believe to be competent and qualified to serve as trial jurors, as prescribed in the last Article.

Sec. 135. A list of the names of the persons so selected, showing the place of residence, and other proper additions, of each of them, so far as those particulars can be conveniently ascertained, must be made out, and signed by the officers, or a majority of them. Within five days after the meeting, the list must be delivered by those officers to the clerk of the District Court and filed by him in his office.

Sec. 136. Immediately after the list has been delivered to him, the clerk must prepare suitable ballots, by writing the name of each person so selected, as contained in the list, with his place of residence, and other additions, on a separate piece of paper. The ballots must be uniform, as nearly as may be, in appearance; and the clerk must deposit them in a box, kept for that purpose, which box shall be known as, and plainly marked, Jury Box No. 1.

Sec. 137. Before depositing the ballots, the clerk must destroy each ballot remaining in the box and remove all contents therefrom.

Sec. 138. The persons whose names are so returned are known as regular jurors, and must serve for one year, and until other persons are selected and returned.

ARTICLE IV.

DRAWING JURORS FOR COURTS OF RECORD.

Section 143. Order of judge for drawing of jury.
" *144. Clerk to draw jury.*
" *145. Drawing, how conducted.*
" *146. Jury Box No. 2.*
" *147. Jurors, when to be drawn from Jury Box No. 2.*

Section 148. Jury Box No. 3.
" *149. Jurors, when to be drawn therefrom.*
" *150. Two or more judges may draw from same box.*

Sec. 143. Whenever the business of the District Court requires the attendance of a trial jury for the trial of civil or criminal cases, and no jury is in attendance, the court may make an order directing a trial jury to be drawn and summoned to attend before said court. Such order must specify the number of jurors to be drawn and the time at which the jurors are required to attend. And the court may direct that such causes, either criminal or civil, in which a jury may be required, or in which a jury may have been demanded, be continued and fixed for trial when a jury shall be in attendance.

Sec. 144. Immediately upon the order mentioned in the preceding section being made, the clerk shall, in the presence of the court, proceed to draw the jurors from Jury Box No. 1.

Sec. 145. The clerk must conduct said drawing as follows:

1. He must shake the box containing the names of the trial jurors, so as to mix the slips of paper upon which such names are written, as well as possible; he must then draw from said box as many slips of paper as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the name on each slip of paper so drawn from said jury box.

3. If the name of any person is drawn from said box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and the slip of paper having such name on it shall be destroyed, and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary, until the whole number of jurors required be drawn. After the drawing shall be completed, the clerk shall make a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order and of the drawing, and the number of the jurors drawn, and the time when and the place where such jurors are required to appear. Such certificate and list shall be delivered to the sheriff for service.

Sec. 146. After the adjournment of the term or session at which trial jurors have been returned, as prescribed in the last section, the clerk must deposit the ballots, containing the names of those who attended and served, in another box kept by him known as and marked Jury Box No. 2. The ballots containing the name of those who did not appear and serve, which have not been destroyed, as prescribed in Section 145, of this Code, must be returned to the box from which they were taken.

Sec. 147. If, at the time of drawing trial jurors for a term or session, there is not a sufficient number of ballots remaining in the box, No. 1, the clerk, after drawing all the ballots therein, must draw the necessary number from Box No. 2, containing the names of those jurors who have before served, as prescribed in the last section; and must continue to draw from that box until new lists of jurors are provided.

Sec. 148. The clerk must keep, in addition to the two boxes specified in the last two sections, a third box, known as and marked, Jury Box No. 3, in which he must deposit duplicate ballots, containing the names, with the proper additions, of all persons selected and returned as trial jurors, who reside in the city or town where a trial term or session ~~of~~ a court of record is held, pursuant to law.

Sec. 149. The ballots kept in Box No. 3 must be destroyed by the clerk, and new ballots must be deposited therein by him, at the same time, and under like circumstances, as prescribed in this Article, with respect to the destruction of the old ballots, and the depositing of new ballots, in the first box.

Sec. 150. In districts where there are two or more judges, each judge may order jurors drawn and summoned to attend the session or term over which he presides, as provided in this Article.

ARTICLE V.

SUMMONING JURORS FOR COURTS OF RECORD.

Section 152. Sheriff to summon jurors, how.
" 153. Drawing and summoning jurors to attend forthwith.
" 154. Summoning jurors to complete a panel.

Sec. 152. The sheriff, as soon as he receives the list or lists of jurors drawn, shall summon the persons named therein to attend the court at the time mentioned in the order, by giving personal notice to that effect to each of them, or by leaving a written notice to that effect at his place of residence, with some person of proper age, and shall return the list to the court at the opening of the regular session thereof, or at such session or time as the jurors may be ordered to attend, specifying the names of those who are summoned, and the manner in which each person was notified.

Sec. 153. If a sufficient number of trial jurors, duly drawn and notified, do not attend or cannot be obtained in the opinion of the court, without great delay or expense to form a jury, the court may, in its discretion, direct the clerk to draw from Box No. 3 in the presence of the court, the names of as many persons as the court deems sufficient for that purpose.

Sec. 154. The sheriff must forthwith notify each person so drawn and make a return as prescribed in Section 152, of this Article.

ARTICLE VI.

SUMMONING JURORS FOR COURTS NOT OF RECORD.

Section 157. Jurors for justices' or police courts.
" *158. How to be summoned.*
" *159. Officer's return.*

Sec. 157. When jurors are required in any of the justices' courts, or in any police or other inferior court, they must, upon the order of the justice, or of the judge thereof, be summoned by the sheriff, constable, marshal, or policeman of the jurisdiction.

Sec. 158. Such jurors must be summoned from the persons competent to serve as jurors, residents of the township, city or town in which such court has jurisdiction, by notifying them orally that they are summoned, and of the time and place at which their attendance is required.

Sec. 159. The officer summoning such jurors shall, at the time fixed in the order for their appearance, return it to the court with a list of the persons summoned indorsed thereon.

ARTICLE VII.

SUMMONING JURIES OF INQUEST.

Section 161. How to be summoned.

Sec. 161. Juries of inquest shall be summoned by the officer before whom the proceedings in which they are to sit are to be had, or by any sheriff, constable, or policeman, from the persons competent to serve as jurors, residents of the county, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

Section 163. Attachment and fine.

Sec. 163. Any juror summoned, who willfully and without reasonable excuse fails to attend, may be attached and compelled to attend; and the court may also impose a fine not exceeding fifty dollars, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until, upon an order to show cause, an opportunity has been offered the juror to be heard. The court may for good cause remit, modify or cause any fine collected to be refunded.

ARTICLE IX.

IMPANELING GRAND JURIES.

Section 165. Grand jury, when to be impaneled.
" *166. How constituted.*

Section 167. Manner of impaneling prescribed in Penal Code.
" 168. In case of two or more judges, each may draw a grand jury, but only one at a time.

Sec. 165. Whenever in the opinion of the district judge a grand jury be necessary, he must make an order directing a grand jury to be drawn and summoned to attend before the court. The order must specify the number of such jurors to be drawn, which must not be less than ten nor more than fifteen. The names of such jurors must be drawn from Jury Box No. 1, mentioned in Section 136, and the list of names certified and summoned, as provided for drawing and summoning trial jurors, and the names of any persons drawn who may not be impanneled upon the grand jury must be again placed in said Jury Box No. 1.

Sec. 166. When, of the persons summoned as grand jurors competent and not excused, seven are present, they constitute the grand jury. If more than seven of such persons are present the clerk must write their names on separate ballots, which he must fold so that the names cannot be seen, place them in a box, and draw out seven of them, and the persons whose names are on the ballots so drawn shall constitute the grand jury. If less than seven of such persons are present, the court may order a sufficient number to be forthwith drawn from either box and summoned to attend the court. And whenever, of the persons to complete a grand jury, more attend than are required, the requisite number must be obtained by writing the names of those so summoned and not excused on ballots, depositing them in a box, and drawing as above provided.

Sec. 167. Thereafter such proceedings must be had in impaneling the grand jury as are prescribed in Part Two, of the Penal Code.

Sec. 168. In districts where there are two or more judges each judge may order a grand jury to be drawn and summoned to attend the session or term over which he presides, as provided in this Article, but no more than one grand jury must ever be in attendance upon any District Court at the same time.

ARTICLE X.

IMPANELING TRIAL JURIES IN COURTS OF RECORD.

Section 170. Clerk to call list of jurors summoned.
" 171. Manner of impaneling prescribed in Part Two.

Sec. 170. At the opening of court on the day trial jurors have been summoned to appear, the clerk shall call the names of those summoned, and the court may then hear the excuses of jurors summoned. The clerk shall then write the names of the jurors present and not excused upon separate slips or ballots of paper, and fold such slips so that the names are concealed, and there in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed or locked until ordered by the court to be opened.

Sec. 171. Whenever thereafter a civil action is called by the court for trial, and a jury is required, such proceedings shall be had in impaneling the trial jury as are prescribed in Part Two, of this Code. If the action be a criminal one, the jury shall be impaneled as prescribed in the Penal Code.

ARTICLE XI.

IMPANELING TRIAL JURIES IN COURTS NOT OF RECORD.

Section 175. Proceedings in forming jury.
" *176. Manner of impaneling.*

Sec. 175. At the time appointed for a jury trial in justices', police or other inferior courts, the list of jurors summoned, which shall be twelve, or double the number agreed upon before the trial by the parties, must be called, and the names of those attending and not excused must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn.

Sec. 176. Thereafter, if the action is a criminal one, the jury must be impaneled as provided in the Penal Code, if a civil one, as provided in Part Two, of this Code.

ARTICLE XII.

IMPANELING JURIES OF INQUEST.

Section 179. Manner of impaneling.

Sec. 179. The manner of impaneling juries of inquest is prescribed in the provisions of the different Codes relating to such inquests.

TITLE IV.

STENOGRAPHERS.

Section 184. Appointment of stenographers.
" *185. Duties of stenographers.*
" *186. Same.*
" *187. To furnish copies to parties, etc.*
" *188. Amount to be paid by each party in civil action.*
" *189. Salary.*
" *190. Stenographer pro tempore.*
" *191. Stenographer's report prima facie evidence.*

Sec. 184. The judge of a District Court may appoint a stenographer for such court, who is an officer of the court, and hold his office during the pleasure of the judge appointing him, and he must subscribe the constitutional oath of office, and file the same with the clerk of the court. In districts where there are two or more judges each judge thereof may appoint a stenographer.

Sec. 185. Each stenographer must, under the direction of the judge, attend all sittings of the court, take full stenographic notes of the testimony, and of all proceedings given or had thereat, except when the judge dispenses with his services in a particular cause, or with respect to a portion of the proceedings therein. The stenographer must file with the clerk forthwith the original stenographic notes taken upon a trial or hearing required to be taken by this section.

Sec. 186. All objections made, the rulings, decisions and opinions of the court, and the exceptions taken during the trial, or hearing, must be written out at length, or printed in type, by the stenographer and filed with the clerk forthwith after the close of the trial, or hearing, and thereafter such exceptions may be settled in a bill of exceptions, as provided in Section 711, of this Code.

Sec. 187. Each stenographer, specified in this Title, must likewise, upon request, furnish, with all reasonable diligence, to the defendant in a criminal cause, or a party, or his attorney in a civil cause, in which he has attended the trial or hearing, a copy, written out at length or in narrative from his stenographic notes, of the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment, by the person requiring the same, the sum of five cents per folio. If the county attorney or Attorney General requires such a copy, in a criminal cause, the stenographer is entitled to his fees therefor; but he must furnish it, and upon furnishing it he shall receive a certificate of the sum to which he is so entitled; which is a county charge, and must be paid by the county treasurer, upon the certificate, like other county charges. If it appears to the judge that a defendant in a criminal case is unable to pay for such copy, the same shall be furnished him and paid for by the county.

Sec. 188. In every issue of fact in civil actions tried before the court or jury before the trial commences, there must be paid into the hands of the clerk of the court, by each party to the suit, the sum of three dollars, which sum must be paid by said clerk into the treasury of the county where the cause is tried, to be applied upon the payment of the salary of the stenographer, and the prevailing party may have the amount so paid by him taxed in his bill of costs, as proper disbursements.

Sec. 189. Every stenographer appointed under the provisions of this Title receives an annual salary of eighteen hundred dollars, and no other compensation except as herein provided, payable in quarterly installments out of the contingent funds of the counties comprising the district for which he is appointed, according and in proportion to the number of suits entered and commenced in the District Courts of such counties respectively the preceding year; and it shall be the duty of the judge of such district, on the first of January of each year, or as soon thereafter as may be, to apportion the amount of such salary to be paid by each county in his district on the basis aforesaid. The stenographer is allowed, in addition to the salary above provided, five cents per folio for each copy of testimony furnished to parties in civil causes, to be paid for by the parties desiring the same. In case the testimony is reduced to a narrative form by the stenographer, not exceeding fiʌe cents per folio may be allowed.

Sec. 190. The stenographer of any District Court must attend to the duties of his office in person, except when excused for good and sufficient reason by order of the court, which order must be entered upon the minutes of the court. Employment in his professional capacity elsewhere is not a good and sufficient reason for such excuse. When the stenographer of any court has been excused in the manner provided in this section, the court may appoint a stenographer *pro tempore*, who must take the same oath and perform the same duties and receive the same compensation during the time of his employment as the regular stenographer.

Sec. 191. The report of the stenographer, or stenographer *pro tempore*, of any court, duly appointed and sworn, when written out in long handwriting or printed in type, and certified as being a correct transcript of the testimony and proceedings in the case, is *prima facie* a correct statement of such testimony and proceedings.

TITLE V.

ATTORNEYS AND COUNSELORS AT LAW.

Section 195. Who may be admitted as attorneys.
" *196. Qualifications.*
" *197. Certificate of admission and license.*
" *198. Oath.*
" *199. Attorneys of other States.*
" *200. Roll of attorneys.*
" *201. Supreme Court may establish rules.*
" *202. Penalty for practicing without license.*
" *203. Authority.*
" *204. Change of attorney.*
" *205. Notice of change.*
" *206. Death or removal of attorney.*
" *207. Removal and suspension.*
" *208. Punishment for deceit.*
" *209. Punishment for willful delay.*

Section 210. Certain loans prohibited.
" *211. Penalty.*
" *212. Limitation of preceding section.*
" *213. Same rule when party prosecutes in person.*
" *214. Partner of county attorney not to defend.*
" *215. Former county attorney not to defend, etc.*
" *216. Partners not to appear on opposite sides.*
" *217. Penalty.*
" *218. Party may appear in person or by attorney.*
" *219. Limitation.*
" *220. Attorney may see prisoner.*
" *221. Attorney not to become surety on bond.*
" *222. Conviction of crime.*
" *223. Proceedings for removal or suspension.*
" *224. Accusation.*
" *225. Verification.*
" *226. Citation.*
" *227. Appearance.*
" *228. Objections to accusation.*
" *229. Demurrer.*
" *230. Answer.*
" *231. Trial.*
" *232. Reference to take depositions.*
" *233. Judgment.*
" *234. Clerks, etc., not to practice.*
" *235. Lien for compensation.*
" 236. *Attorney may be compelled to show his authority.*

Sec. 195. Any citizen, or person resident of this State, who has *bona fide* declared his or her intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all the courts of this State. All persons are attorneys of the Supreme Court who were entitled to practice in the Supreme Court when this Code takes effect.

Sec. 196. Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character and a certificate from one or more reputable counselors at law, that he has been engaged in the study of law for two successive years prior to the making of such application, and undergo a strict examination in open court as to his qualifications, by the justices of the Supreme Court.

Sec. 197. If upon examination he is found qualified, the Supreme Court must admit him as an attorney and counselor in all the courts of this State, and must direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license.

Sec. 198. Every person on his admission must take an oath to support the Constitution of the United States and the Constitution of the State of Montana, and to faithfully discharge the duties of an attorney and counselor at law with fidelity to the best of his knowledge and ability. A certificate of such oath must be indorsed upon the license and a duplicate filed with the clerk.

Sec. 199. Every citizen of the United States, or person resident of this State, who has *bona fide* declared his or her intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest court of another State, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, may be admitted to practice in the courts of this State, upon the production of his or her license, and satisfactory evidence of good moral character; but the court may examine the applicant as to his or her qualifications.

Sec. 200. The clerk of the Supreme Court must keep a roll of the attorneys and counselors admitted to practice, which must be signed by the person admitted before he receives his license.

Sec. 201. The Supreme Court may establish rules for the admission of attorneys and counselors not inconsistent with this Title.

Sec. 202. If any person practice law in any court, except a justice's court or police court, without having received a license as attorney and counselor, he is guilty of a contempt of court.

Sec. 203. An attorney and counselor has authority:

1. To bind his client in any steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise.

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

Sec. 204. The attorney in an action or special proceeding may be changed at any time before or after judgment, or final determination, as follows:

1. Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes.

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

Sec. 205. When an attorney is changed, as provided in the last section, written notice of the change and the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney.

Sec. 206. When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or appear in person.

Sec. 207. An attorney and counselor may be removed or suspended by the Supreme Court or by the District Court of the State, for either of the following causes, arising after his admission to practice:

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence.

2. Willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counselor.

3. Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding.

4. Lending his name to be used as attorney and counselor by another person who is not an attorney and counselor.

5. Who is guilty of any deceit, malpractice, crime or misdemeanor.

In all cases where an attorney is removed or suspended by the District Court, the judgment or order of removal or suspension may be reviewed on appeal by the Supreme Court.

Sec. 208. An attorney or counselor, who is guilty of any deceit or collusion or consents to any deceit or collusion, with intent to deceive the court or a party, forfeits to the party injured by his deceit or collusion, treble damages. He is also guilty of a misdemeanor.

Sec. 209. An attorney and counselor who willfully delays his client's cause, with a view to his own gain, or willfully receives money, or an allowance for or on account of money, which he has not laid out or become answerable for, forfeits to the party injured treble damages.

Sec. 210. An attorney and counselor must not, directly or indirectly, buy or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

Sec. 211. An attorney and counselor must not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon. But this section does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received. An attorney and counselor who violates either of the last two sections, is guilty of a misdemeanor; and on conviction thereof, shall be punished accordingly, and must be removed from office by the Supreme Court.

Sec. 212. The last three sections do not prohibit the receipt by an attorney or counselor, of a bond, promissory note, bill of exchange, book debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted; or from buying or receiving a bill of exchange, draft, or other thing in action, for the purpose of remittance, and without intent to violate either of those sections.

Sec. 213. The last four sections apply to a person prosecuting an action in person, who does an act, which an attorney and counselor is therein forbidden to do.

Sec. 214. An attorney and counselor must not, directly or indirectly, advise concerning, aid, or take any part in, in the defence of an action or special proceeding, civil or criminal, brought, carried on, aided, advocated, or prosecuted, as Attorney General, county attorney, or other public prosecutor, by a person with whom he is interested or connected, either directly or indirectly, as a law partner; or take or receive, directly or indirectly, from a defendant therein or other person, a fee, gratuity, or reward, for or upon any cause, consideration, pretence, understanding, or agreement whatever, either express or implied, having relation thereto, or to the prosecution or defence thereof.

Sec. 215. An attorney and counselor, who has brought, carried on, aided, advocated or prosecuted, or has been in anywise connected with an action or special proceeding, civil or criminal, as Attorney General, county attorney, or other public prosecutor, must not, at any time thereafter, directly or indirectly, advise concerning, aid or take any part in the defence thereof; or take or receive, either directly or indirectly, from a defendant therein, or other person, a fee, gratuity, or reward, for or upon any cause, consideration, pretence, understanding, or agreement, either express or implied, having relation thereto, or to the prosecution or defence thereof.

Sec. 216. Whenever a law partnership, or any member thereof, accepts employment to prosecute or defend any action, civil or criminal, or to advise in relation thereto, no member of said partnership is permitted, then or afterward, to act as attorney or counselor on the side opposite to that upon which such original employment was had. But this section does not prevent a person, who has been employed as attorney and counselor in an action or proceeding before becoming a member of a partnership, from appearing and acting therein until its completion.

Sec. 217. An attorney and counselor who violates either of the last two sections is guilty of a misdemeanor, and, on conviction thereof, shall be punished accordingly, and must be removed from office by the Supreme or District Court.

Sec. 218. A party to a civil action, who is of full age, may prosecute or defend the same in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs. Each provision of this chapter, relating to the conduct of an action, wherein the attorney for the party is mentioned, includes a party prosecuting or defending in person, unless otherwise specially prescribed therein, or unless that construction is manifestly repugnant to the context. If a party has an attorney in the action he cannot appear to act in person where an attorney may appear or act, either by special provision of law, or by the course and practice of the court.

Sec. 219. This Article does not prohibit an attorney or counselor from defending himself in person, if prosecuted either civilly or criminally.

Sec. 220. All public officers, sheriffs, coroners, jailers, constables or other officers or persons, having in custody any person committed, imprisoned or restrained of his liberty, for any alleged cause whatever, must admit any practicing attorney and counselor at law in this State, whom such person restrained of his liberty may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody. Any officer violating this provision shall forfeit and pay one hundred dollars to the person aggrieved, to be recovered by action of debt in any court of competent jurisdiction.

Sec. 221. No attorney and counselor at law shall become security in any bond or recognizance of any sheriff, constable or coroner, or in any bond or recognizance for the appearance of any person or persons charged with any public offence, or upon any bond, undertaking or recognizance authorized by any statute to be taken for the payment of any sum of money into court in default of the principal, without the consent of the judge of the District Court first had, approving said security.

Sec. 222. In case of the conviction of an attorney and counselor of a felony or misdemeanor, involving moral turpitude, the clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the Supreme Court a certified copy of the record of conviction.

Sec. 223. The proceedings to remove or suspend an attorney and counselor under the first subdivision of Section 207 must be taken by the court on the receipt of a certified copy of the record of conviction. The proceedings under the second, third or fourth subdivision of Section 207, may be taken by the court for the matters within its knowledge, or may be taken upon the information of another.

Sec. 224. If the proceedings are upon the information of another, the accusation must be in writing.

Sec. 225. The accusation must state the matters charged, and be verified by the oath of some person to the effect that the charges therein contained are true.

Sec. 226. Upon receiving the accusation, the court must make an order requiring the accused to appear and answer it at a specified time, and cause a copy of the order and of the accusation to be served upon the accused at least five days before the day appointed in the order.

Sec. 227. The accused must appear at the time appointed in the order and answer the accusations, unless for sufficient cause the court assign another day for that purpose. If he do not appear the court may proceed and determine the accusation in his absence.

Sec. 228. The accused may answer to the accusation either by objecting to its sufficiency or denying it.

Sec. 229. If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the ground of the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

Sec. 230. If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the court.

Sec. 231. If the accused plead guilty, or refuse to answer the accusation, the court must proceed to judgment of removal or suspension. If he deny the matters charged, the court must, at such time as it may appoint, try the accusation.

Sec. 232. The court may, in its discretion, order a reference to a committee or referee to take depositions in the matter.

Sec. 233. Upon conviction, in cases arising under the first subdivision of Section 207, the judgment of the court must be that the name of the party be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this State; and upon conviction in cases under the other subdivisions of that section, the judgment of the court may be according to the gravity of the offense charged: deprivation of the right to practice as attorney or counselor in the courts of this State permanently, or for a limited period.

Sec. 234. The clerk, deputy clerk, sheriff, under sheriff, deputy sheriff or coroner, must not, during his continuance in office, practice as attorney and counselor in any court.

Sec. 235. The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whose ever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.

Sec. 236. The court or judge, on motion of either party, may require the attorney of the adverse party to produce and prove the authority under which he appears, and may stay all proceedings until such is shown, and may at any time summarily relieve a party from the consequences of the acts of an unauthorized attorney.

CHAPTER II.

OTHER PERSONS INVESTED WITH SUCH POWERS.

Section 238. Receivers, executors, administrators and guardians.

Sec. 238. The appointment, powers and duties of receivers, executors, administrators and guardians, are provided for and prescribed in Parts Two and Three, of this Code.

PART II.

CIVIL ACTIONS.

Title I. Form of Civil Actions.
" II. Time of Commencing Civil Actions.
" III. Parties to Civil Actions.
" IV. Place of Trial of Civil Actions.
" V. Manner of Commencing Suit.
" VI. Pleadings in Civil Actions.
" VII. Provisional Remedies in Civil Actions.
" VIII. Trial and Judgment in Civil Actions.
" IX. Execution of the Judgment in Civil Actions.
" X. Actions in Particular Cases.
" XI. Proceedings in Justices' Courts.
" XII. Proceedings in Police Courts.
" XIII. Appeals in Civil Actions.
" XIV. Miscellaneous Provisions.

TITLE I.

FORM OF CIVIL ACTIONS.

Section 242. One form of civil actions only.
" 243. Parties to actions, how designated.
" 244. Special issues not made by pleadings, how tried.

Sec. 242. There is in this State but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs.

Sec. 243. In such action, the party complaining is known as the plaintiff, and the adverse party as the defendant.

Sec. 244. A question of fact not put in issue by the pleadings may be tried by a jury or court, upon an order for the trial, stating distinctly and plainly the question of fact to be tried, and such order is the only authority necessary for a trial.

TITLE II.

TIME OF COMMENCING ACTIONS.

Chapter I. The Time of Commencing Actions in General.
" II. The Time of Commencing Actions for the Recovery of Real Property.
" III. The Time of Commencing Actions Than for the Recovery of Real Property.
" IV. General Provisions as to the Time of Commencing Actions.

CHAPTER I.

THE TIME OF COMMENCING ACTIONS IN GENERAL.

Section 248. Commencement of civil actions.

Sec. 248. Civil actions can only be commenced within the periods prescribed in this Title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

CHAPTER II.

THE TIME FOR COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

Section 252. When the State will not sue.
" 253. When actions cannot be brought by grantee from the State.
" 254. When actions by the State or its grantees are to be brought within ten years.
" 255. Seizen within ten years, when necessary in actions for real property. Action for dower.
" 256. Such seizen, when necessary in action or defense arising out of title to or rents of real property.
" 257. Entry on real estate.
" 258. Possession, when presumed. Occupation deemed under legal title, unless adverse.
" 259. Occupation under written instrument or judgment, when deemed adverse.
" 250. What constitutes adverse possession under written instrument or judgment.

Section 261. Premises actually occupied under claim of title deemed to be held adversely.
" *262. What constitutes adverse possession under claim of title not written.*
" *263. Relation of landlord and tenant as affecting adverse possession.*
" *264. Right of possession not affected by descent cast.*
" *265. Certain disabilities excluded from time to commence actions.*
" *266. Limitation as to placer claims.*

Sec. 252. The State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the State to the same, unless:

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

2. The State, or those from whom it claims, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years.

Sec. 253. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this State, unless the same might have been commenced by the State as herein specified, in case such patent had not been issued or grant made.

Sec. 254. When letters patent or grants of real property issued or made by the State, are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought, either by the State or by any subsequent patentee or grantee of the property, his heirs or assigns, within ten years after such determination, but not after that period.

Sec. 255. No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question, within ten years before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within ten years after the death of her husband.

Sec. 256. No cause of action, or defence to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within ten years before the commencement of the act in respect to which such action is prosecuted or defence made.

Sec. 257. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within ten years from the time when the right to make it descended or accrued.

Sec. 258. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof, within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for ten years before the commencement of the action.

Sec. 259. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property, under such claim, for ten years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Sec. 260. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purpose of husbandry, or for pasturage, or for the ordinary use of the occupant.
4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that has been left not cleared or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Sec. 261. Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

Sec. 262. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

Sec. 263. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of ten years from the termination of the tenantcy or where there has been no written lease, until the expiration of ten years from the time of the last payment of rent, notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption cannot be made after the periods prescribed in this section.

Sec. 264. The right of a person to the possession of real property is not impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

Sec. 265. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or for dower or to make any entry or defence founded on the title to real property, or to rents or services out of the same: be at the time such title firsts descends or accrues, either

1. Within the age of majority; or
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term of less than for life; the time during which such diability continues is not deemed any portion of the time in this Chapter limited for the commencement of such action, or the making of such entry or defence, but such action may be commenced, or entry or defense made, within the period of ten years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced or entry or defence made, after that period.

Sec. 266. No action for the recovery of mining claims (lode claims excepted), or for the recovery of possession thereof, shall be maintained, unless it appears that the plaintiff or his assigns was seized or possessed of such mining claims within one year before the commencement of such action.

CHAPTER III.

THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

Section 270 Periods of limitation prescribed.
" *271 Within ten years.*
" *272 Within eight years.*
" *273 Within five years.*
" *274 Within three years.*
" *275 Within two years.*
" *276 Within one year.*

Section 277. Within six months.
" *278. Actions for relief not hereinbefore provided for.*
" *279. Where cause of action accrues on mutual account.*
" *280. Actions by the State subject to limitation by this Chapter.*
" *281. Action to redeem mortgage.*
" *282. Same, when some of mortgagors are not entitled to redeem.*
" *283. Banks, deposits, no limitation.*

Sec. 270. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows :

Sec. 271. Within ten years :

1. An action upon a judgment or decree of any court of record of the United States, or of any State within the United States.

2. An action for mense profits of real property.

Sec. 272. Within eight years :

An action upon any contract, obligation, or liability, founded upon an instrument in writing.

Sec. 273. Within five years :

1. An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for trespass upon real property.

3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

5. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends.

6. An action upon a judgment or decree, rendered in a court not of record. The cause of action, in such a case, is deemed to have accrued, when final judgment was rendered.

Sec. 274. Within three years:

1. An action upon a contract, account, promise, obligation or liability, not founded on an instrument in writing.

2. An action against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

3. An action to recover damages for the death of one caused by the wrongful act or neglect of another.

Sec. 275. Within two years:

1. An action upon a statute for a penalty or forfeiture, when the acction is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation.

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the State.

3. An action for libel, slander, assault, battery, false imprisonment, or seduction.

Sec. 276. Within one year:

1. An action against a sheriff, or other officer, for an escape of a prisoner, arrested or imprisoned on civil process.

2. An action against a municipal corporation for damages or injuries to property caused by a mob or riot; or by a municipal corporation for the violation of any city or town ordinance.

3. An action against an officer, or officer *de facto*, to recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

Sec. 277. Within six months:

1. To recover stock sold for a delinquent assessment.

2. Actions on claims against a county, which have been rejected by the county commissioners, must be commenced within six months after the first rejection thereof by such board.

3. For killing or injuring stock by a railroad corporation or company.

Sec. 278. An action for relief not hereinbefore provided for, must be commenced within five years after the cause of action shall have accrued.

Sec. 279. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Sec. 280. The limitations prescribed in this Chapter apply to actions brought in the name of the State, or for the benefit of the State, in the same manner as to actions by private parties.

Sec. 281. An action to redeem a mortgage of real property with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for ten years after breach of some condition of the mortgage.

Sec. 282. If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action, under the provisions of this Chapter, any one of them who is entitled to maintain such an action, may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits, proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises.

Sec. 283. To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan corporation, association or society, there is no limitation.

CHAPTER IV.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

Section 286. When an action is commenced.
" *287. Exception, where defendant is out of the State.*
" *288. Exception as to persons under disabilities.*
" *289. Provision where person entitled dies before limitation expires.*
" *290. Where person dies out of State.*
" *291. Time between death and letters of administration.*
" *292. Suits by aliens in time of war.*
" *293. When judgment has been reversed.*
" *294. When stayed by injunction, etc.*
" *295. Disability must exist when right of action accrued.*
" *296. Two or more disabilities.*
" *297. When demand necessary.*
" *298. In case of submission to arbitration.*
" *299. When action discontinued, etc.*
" *300. This title applicable to directors, etc.*
" *301. Acknowledgment and part payment.*
" *302. Action against non-resident.*
" *303. Existing causes of action not affected.*
" *304. Objection taken by answer.*
" *305. Action includes special proceedings.*

Sec. 286. An action is commenced within the meaning of this Title, when the complaint is filed.

Sec. 287. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

Sec. 288. If a person entitled to bring an action, mentioned in Chapter III., of this Title, be at the time the cause of action accrued, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life;

the time of such disability is not a part of the time, limited in this Title for commencing the action; except that the time so limited cannot be extended more than five years by any such disability, except infancy; or, in any case, more than one year after the disability ceases.

Sec. 289. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

Sec. 290. If a person, against whom a cause of action exists, dies, without the State, the time which elapses between his death, and the expiration of one year, after the issuing, within the State, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.

Sec. 291. For the purpose of computing the time within which an action must be commenced in a court of this State, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of letters testamentary or letters of administration; or to recover damages for taking, detaining, or injuring personal property within the same period, the letters are deemed to have been issued within five years after the death of the testator or intestate. But where an action is barred by this section any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of majority, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such disability, maintain an action to recover damages by reason thereof, in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.

Sec. 292. When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

Sec. 293. If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the cause of action survives, his representative may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination.

Sec. 294. When the commencement of an action is stayed by injunction, or other order of court or judge, or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

Sec. 295. No person can avail himself of a disability, unless it existed when his right of action or entry accrued.

Sec. 296. When two or more disabilities co-exist at the time the right of action or entry accrues, the limitation does not attach until they are removed.

Sec. 297. Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time, when the right to make the demand is complete; except in one of the following cases:

1. Where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends.

2. Where there was a deposit of money, not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.

Sec. 298. Where the persons, who might be adverse parties in an action, have entered into a written agreement to submit to arbitration, or to refer the cause of action, or a controversy in which it might be available, or have entered into a written submission thereof to arbitrators; and before an award, or other determination thereupon, the agreement or submission is revoked, so as to render it ineffectual, by the death of either party thereto, or by the act of the person against whom the action might have been brought; or the execution thereof, or the remedy upon an award or other determination thereunder, is stayed by injunction, or other order procured by him from a competent court or judge; the time which has elaspsed between the entering into the written submission or agreement and the revocation thereof, or the expiration of the stay, is not a part of the time limited for the commencement of the action.

Sec. 299. Where a defendant in an action has interposed an answer, in support of which he would be entitled to rely at the trial, upon a defence or counterclaim then existing in his favor, the remedy upon which, at the time of the commencement of the action, was not barred by the provisions of this Title; and the complaint is dismissed, or the action is discontinued, or abates in consequence of the plaintiff's death, the time which intervened, between the commencement and the termination of the action, is not a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defence, or to interpose the same defence in another action brought by the same plaintiff, or a person deriving title from or under him.

Sec. 300. This Title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created.

Sec. 301. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this Title, unless the same is contained in some writing, signed by the party to be charged thereby. But this section does not alter the effect of any payment of principal or interest, which payment is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.

Sec. 302. Where a cause of action, which does not involve the title to or possession of real property within the State, accrues against a person, who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative, after the expiration of the time, limited by the laws of his residence, for bringing a like action, except by a resident of the State, and in one of the following cases:

1. Where the cause of action originally accrued in favor of a resident of the State.

2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the State; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the State.

Sec. 303. This Title does not extend to actions already commenced nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force immediately before the taking effect of this Code, are applicable to such actions and cases, and are repealed subject to the provisions of this section.

Sec. 304. The objection that the action was not commenced within the time limited can be taken only by answer. The corresponding objection to a defence or counterclaim can be taken only by reply except where a reply is not required, in order to enable the plaintiff to raise an issue of fact, upon an allegation contained in the answer.

Sec. 305. The word "action," as used in this Title, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

TITLE III.

PARTIES TO CIVIL ACTIONS.

Section 310. Action to be in name of party in interest.
" *311. Assignment of thing in action not to prejudice defence.*
" *312. When a married woman is a party—actions by and against.*
" *313. Wife may defend, when.*
" *314. Infant to appear by guardian.*
" *315. Guardian, how appointed.*
" *316. Unmarried female may sue, for her own seduction.*
" *317. Father, etc., may sue for seduction of daughter, etc.*
" *318. Father, etc., may sue, for injury or death of child.*
" *319. When representatives may sue for death of one caused by the wrongful act of another.*
" *320. Who may be joined as plaintiffs.*
" *321. Who may be joined as defendants.*
" *322. Parties defendant in an action to determine conflicting claims to real property.*
" *323. Parties holding title under a common source, when may join.*
" *324. Parties in interest, when to be joined. When one or more may sue or defend for the whole.*
" *325. Plaintiff may sue in one action the different parties to commercial paper.*
" *326. Tenants in common, etc., may sever in bringing or defending actions.*
" *327. Action, when not to abate by death, marriage or other disability. Proceedings in such case.*

Section 328. Another person may be substituted for the defendant.
" *329. Intervention, when it takes place and how made.*
" *330. Associates may be sued by name of association.*
" *331. When other parties must be brought in.*
" *332. Action by one joint tenant against his co-tenant.*
" *333. Who may be sued; transfer.*

Sec. 310. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

Sec. 311. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defence existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity.

Sec. 312. A married woman may sue and be sued in the same manner as if she were sole.

Sec. 313. If a husband and wife be sued together the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.

Sec. 314. When an infant or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending in each case. A guardian *ad litem* may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.

Sec. 315. When a guardian *ad litem* is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons, or if under that age, or if he neglects so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action.

3. When an insane or incompetent person is party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

Sec. 316. An unmarried female may prosecute, as plaintiff, in an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

Sec. 317. A father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterward, and there be no loss of service.

Sec. 318. A father, or in case of his death, or desertion of his family, the mother may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.

Sec. 319. When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just.

Sec. 320. All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this Title.

Sec. 321. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.

Sec. 322. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and the persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed.

Sec. 323. Any two or more persons claiming an estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, or in severalty, may unite in an action against any person claiming an adverse interest or estate therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

Sec. 324. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Sec. 325. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

Sec. 326. All persons holding as tenants in common, joint tenants, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party. In all cases one tenant in common or joint tenant can sue his cotenant.

Sec. 327. An action, or cause of action, or defense, shall not abate by death, or other disability of a party, or by the transfer of any interest therein, but shall, in all cases, where a cause of action or defence arose in favor of such party prior to his death, or other disability or transfer of interest therein, survive, and be maintained by his representatives or successors in interest; and in case such action has not been begun or defence interposed, the action may be begun or defence set up in the name of his representatives or successors in interest; and in case the action has been begun or defence set up, the court shall, on motion, allow the action or proceeding to be continued by or against his representatives or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

Sec. 328. A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

Sec. 329. Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint.

Sec. 330. When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability.

Sec. 331. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.

Sec. 332. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist.

Sec. 333. A holder of over-due bills of exchange and promissory notes may sue all the parties thereto collectively or severally, but if any of the parties thereto, who are not primarily liable for the payment, shall tender the amount of principal, interest and costs thereon, he shall transfer the paper, and if a judgment be rendered thereon, he shall assign the judgment to such party so making the tender; and in case of refusal he may be compelled to do so by summary proceedings, for that purpose instituted, in the District Court of the district in which he shall reside.

TITLE VI.

PLACE OF TRIAL OF CIVIL ACTIONS.

Section 335. Certain actions to be tried where the subject or some part thereof is situated.
" *336. Other actions, where the cause or some part thereof arose.*
" *337. Place of trial of actions against counties.*
" *338. Other actions according to the residence of the parties.*
" *339. Action may be tried in any county, unless the defendant demand a trial in the proper county.*
" *340. Place of trial may be changed in certain cases.*
" *341. When judge is disqualified, cause to be transferred.*
" *342. Papers to be transmitted, costs, etc., jurisdiction, etc.*
" *343. Proceedings after judgment in certain cases transferred.*
" *344. Change of place of trial on agreement of parties.*

Sec. 335. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this Code:

1. For the recovery of real property, or of an estate or an interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
2. For the partition of real property.
3. For the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

Sec. 336. Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to charge the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute; except that, when it is imposed for an offence committed on a lake, river, or other stream of water, situated in

two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed.

2. Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, does anything touching the duties of such officer.

Sec. 337. An action against a county may be commenced and tried in such county, unless such action is brought by a county, in which case it may be commenced and tried in any county not a party thereto.

Sec. 338. In all other cases, the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or where the plaintiff resides, and the defendants, or any of them, may be found; or if none of the defendants reside in the State, or, if residing in the State, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the State, such action may be tried in any county where either of the parties may reside, or service be had. Actions upon contracts may be tried in the county in which the contract was to be performed; and actions for torts in the county where the tort was committed; subject, however, to the power of the court to change the place of trial, as provided in this Code.

Sec. 339. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.

Sec. 340. The court may, on motion, change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county.

2. When there is reason to believe that an impartial trial cannot be had therein.

3. When the convenience of witnesses and the ends of justice would be promoted by the change.

4. When from any cause the judge is disqualified from acting; but in case the judge of another district will appear and try the action, no change of the place of trial must be made.

Sec. 341. If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, or if, from any cause, the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, as follows:

1. If in a District Court, to another District Court.

2. If in a justices' court, to another justices' court in the same county.

Sec. 342. When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace must transmit the pleading and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

Sec. 343. When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, docket, and record the judgment in the record of the court, briefly designating it as a judgment transferred from ——— court (naming the proper court).

Sec. 344. All the parties to an action by stipulation or by consent in open court, entered in the minutes, may agree that the place of trial may be changed to any county in the State. Thereupon the court must order the change as agreed upon.

TITLE V.

MANNER OF COMMENCING CIVIL ACTIONS.

Section 345. Actions, how commenced.
" *346. Complaint, how indorsed. When summons may be issued and how waived.*
" *347. Summons, how issued, directed, and what to contain.*
" *348. Alias summons.*
" *349. Notice of the pendency of an action affecting the title to real property.*
" *350. Summons, how served and returned.*
" *351. Summons, how served.*
" *352. Publication when defendant is absent from the State, concealed, or a foreign corporation having no agent, etc.*
" *353. Manner of publication.*
" *354. What summons for publication to contain.*
" *355. Sheriff to serve papers sent by mail.*

Section 356. Proceedings when only part of the defendants are served.
" *357. Proof of service, how made.*
" *358. When jurisdiction of action acquired.*

Sec. 345. Civil actions in the courts of record of this State are commenced by filing a complaint.

Sec. 346. The clerk must indorse on the complaint the day, month and year that it is filed; and at any time within one year thereafter, the plaintiff may have summons issued; and if the action be brought against two or more defendants, who reside in different counties, may have summons issued for each of such counties at the same time. But at any time within one year after the complaint is filed, the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others may be served or appear after the year, at any time before trial.

Sec. 347. The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court, and must contain: The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed, and must be substantially as follows:

(Title of the court and cause.)

To the above named defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness my hand and the seal of said court this ——— day of ———.

The name of the plaintiff's attorney must be indorsed on the summons.

Sec. 348. If the summons is returned without being served on any or all of the defendants, or if it has been lost, the clerk, upon the demand of the plaintiff, may issue an alias summons, in the same form as the original. But no such alias summons shall be issued after the expiration of one year from the date of filing the complaint.

Sec. 349. In an action affecting the title or right of possession of real property, or in an action between husband and wife, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may file in the office of the clerk of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties and the object of the action or defence, and a description of the property in that county affected thereby. From the time of filing such notice, only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

Sec. 350. The summons may be served by the sheriff of the county where the defendant is found, or by any other person over the age of eighteen, not a party to the action. A copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. When the summons is served by the sheriff it must be returned with his certificate of service, and of the service of any copy of the complaint, where such copy is served, to the office of the clerk from which it issued. When it is served by any other person it must be returned to the same place, with an affidavit of such person of its service and of the service of the copy of the complaint, where such copy is served.

Sec. 351. The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation formed under the laws of this State, to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business and having a managing or business agent, cashier or secretary within this State, to such agent, cashier or secretary, or to a person designated as provided in Section 616, of the Civil Code.

3. Any corporation doing business in this State may be served with summons, by delivering a copy of the same to the president, secretary, treasurer or other officer of the corporation, or to the agent designated by such corporation as the person upon whom service shall be made as required by law, and if none of the persons above mentioned can be found in the county, then service may be made upon any clerk, superintendent, general agent, cashier, principal director, ticket agent, station keeper, managing agent or other agent, having the management, direction, or control of any property of such corporation. If none of the persons in this section described can be found in the county in which such action is commenced, then service may be made, as provided in this section, upon any of the persons herein described, in any county of this State.

4. If against a minor under the age of fourteen years, residing within this State, to such minor, personally, and also to his father, mother or guardian, or, if there be none within this

State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

5. If against a person residing within this State, who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such person and also to his guardian.

6. If against a county, city or town, to the president or chairman of the Board of County Commissioners, president of the council, or trustees, mayor, or other head of the legislative department thereof.

7. In all other cases to the defendant personally.

Sec. 352. When the person on whom the service of a summons is to be made, resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of the summons; or when the defendant is a foreign corporation, having no managing or business agent, cashier, secretary or other officer within the State, and an affidavit stating any of these facts is filed with the clerk of the court in which the action is brought, and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of the summons is to be made, and that he or it is a necessary or proper party to the action, the clerk of the court in which the action is commenced shall cause the service of the summons to be made by publication thereof.

Sec. 353. The order of the clerk must direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, at least once a week for four successive weeks. In case of publication, where the residence of a non-resident or absent defendant is known, the clerk must forthwith deposit a copy of the summons and complaint in the postoffice, directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the postoffice. The service of summons is complete on the day of the fourth publication.

Sec. 354. If service is had by publication, the summons, in addition to the requirements of Section 347, shall contain a general statement of the nature of the action.

Sec. 355. It is the duty of the clerk of any District Court, at the request of a party in any civil action pending in such court, his agent or attorney, to forward by mail any process, summons, or other papers required in the cause, and it is the duty of the sheriff or other officer to whom said papers may be directed to receive the same at the place where the same are directed, and for service shall be entitled to charge mileage only from the point where received to the place of service; but in such case it is lawful for the officer to return the process to the court by mail or express. But in no case shall the officer receiving papers for service be required to serve the same, unless the person in whose behalf the service is made, his agent or attorney, first pay the cost of the service upon a demand therefor by the officer; and when process in one county is intended for service in another, it is the duty of the clerk to forward the same in like manner, and the sheriff or other officer serving the same is entitled to like mileage, and no more, and may make like return of the papers served. If any sheriff or other officer refuse to receive any summons or other process at the point where directed to him, or to serve the same, he is guilty of a misdemeanor, and upon conviction thereof must be fined in any sum not exceeding one hundred dollars.

Sec. 356. When the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

Sec. 357. Proof of the service of summons and complaint must be as follows:

1. If served by the sheriff, his certificate thereof.
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons and complaint in the postoffice, if the same has been deposited; or,
4. The written admission of the defendant. In case of service otherwise than by publication, the certificate or affidavit must state the time and place of service.

Sec. 358. From the time of the service of the summons and a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and a copy of the complaint upon him.

TITLE VI.

PLEADINGS IN CIVIL ACTIONS.

Chapter *I. The Pleadings in General.*
" *II. Complaint.*
" *III. Demurrer to the Complaint.*
" *IV. Ansmer.*
" *V. Demurrer to Answer.*
" *VI. Reply.*
" *VII. Verification of Pleadings.*
" *VIII. General Rules of Pleadings.*
" *IX. Variance—Mistakes in Pleadings and Amendments.*

CHAPTER I.

PLEADINGS IN GENERAL.

Section 368. Definition of pleadings.
" 369. This Code prescribes the form and rules of pleadings.
" 370. What pleadings are allowed.

Sec. 368. The pleadings are the formal allegations by the parties of their respective claims and defences for the judgment of the court.

Sec. 369. The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings are to be determined, are those prescribed in this Code.

Sec. 370. The only pleadings allowed on the part of the plaintiff are:

1. The complaint.
2. The demurrer to the answer.
3. The reply to defendant's answer.

And on the part of the defendant:

1. The demurrer to the complaint.
2. The answer.
3. The demurrer to reply.

CHAPTER II.

COMPLAINT.

Section 373. Complaint, first pleading.
" 374. Complaint, what to contain.
" 375. What causes of action may be joined.

Sec. 373. The first pleading on the part of the plaintiff is the complaint.

Sec. 374. The complaint must contain :

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action.

2. A statement of the facts constituting the cause of action, in ordinary and concise language.

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount must be stated.

Sec. 375. The plaintiff may unite several causes of action, legal or equitable, or both, in the same complaint, where they all arise out of :

1. Contracts, express or implied.

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same, and for an injunction to stay waste or injury thereto.

3. Claims to recover specific personal property, with or without damages, for the withholding thereof.

4. Claims against a trustee by virtue of a contract or by operation of law.

5. Injuries to character.

6. Injuries to person.

7. Injuries to property.

The causes of action so united must all appear on the face of the complaint, to belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.

CHAPTER III.

DEMURRER TO COMPLAINT.

Section 378. When defendant may demur.
" 379. Demurrer must specify, etc. May be taken to all or part.
" 380. What proceedings are to be had when complaint amended.
" 381. Objection not appearing on complaint, may be taken by answer.
" 382. Objections, when deemed waived.

Sec. 378. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not the legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect or misjoinder of parties plaintiff or defendant; or,

5. That causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action; or,

7. That the complaint is ambiguous, unintelligible, or uncertain.

Sec. 379. The demurrer must distinctly specify the objections to the complaint; otherwise, it may be disregarded. An objection taken under Subdivison 1, 3, or 6 of Section 378, of this Code, may be stated in the language of the subdivision; an objection taken under either of the other subdivisions, must point out specifically the particular defect relied upon.

Sec. 380. The defendant may demur to the whole complaint, or to one or more separate causes of action stated therein. In the latter case, he may answer the causes of action not demurred to.

Sec. 381. If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint, as amended to be filed, and a copy of the amendments, or amended complaint, must be served upon the defendants affected thereby. The defendant must answer the amendment, or complaint, as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases.

Sec. 382. When any of the matters enumerated in Section 378 do not appear upon the face of the complaint, the objection may be taken by answer.

Sec. 383. If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

CHAPTER VI.

ANSWER.

Section 386. Answer, what to contain.
" *387. Counter-claim, defined.*
" *388. Counter-claim, rules thereof.*
" *389. Judgment on same.*
" *390. Affirmative relief.*
" *391. Counter-claim, executor, etc.*
" *392. When plaintiff is executor, etc.*
" *393. When defendant omits to set up counter-claim.*
" *394. Counter-claim not barred by death or assignment.*
" *395. Defendant may set forth all his defences and counter-claims.*
" *396. Partial defences.*
" *397. When defendant may demand affirmative judgment.*
" *398. When answer admits part of plaintiff's claim.*
" *399. Judgment for excess.*

Sec. 386. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer.

2. A statement of any new matter constituting a defence or counterclaim.

Sec. 387. The counterclaim, specified in the last section, must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

Sec. 388. But the counterclaim, specified in Subdivision 2 of the last section, is subject to the following rules:

1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand, existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand, existing against a person who assigned or transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him.

3. If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.

Sec. 389. Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff. Where part of the excess is not due from the plaintiff, the judgment does not prejudice the defendant's right to recover from another person so much thereof as the judgment does not cancel.

Sec. 390. In a case not specified in the last section, where a counterclaim is established, which entitles the defendant to an affirmative judgment, demanded in the answer, judgment must be rendered for the defendant accordingly.

Sec. 391. In an action against an executor or an administrator, or other person sued in a representative capacity, the defendant may set forth, as a counterclaim, a demand belonging to the decedent, or other person whom he represents, where the person so represented would have been entitled to set forth the same, in an action against him.

Sec. 392. In an action brought by an executor or administrator, in his respresentative capacity, a demand against the decedent, belonging at the time of his death to the defendant, may be set forth by the defendant as a counterclaim, as if the action had been brought by the decedent in his lifetime; and, if a balance is found to be due the defendant, judgment must be rendered therefor against the plaintiff in his representative capacity. Execution can be issued upon such a judgment, only in a case where it could be issued upon a judgment, in an action against the executor or administrator.

Sec. 393. If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of Section 387, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

Sec. 394. When crossdemands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other.

Sec. 395. A defendant may set forth, in his answer, as many defences or counter-claims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defence or counterclaim must be separately stated and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.

Sec. 396. A partial defence may be set forth, as prescribed in the last section; but it must be expressly stated to be a partial defence to the entire complaint, or to one or more separate causes of action, therein set forth. Upon a demurrer thereto, the question is, whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defence, within the meaning of this section.

Sec. 397. Where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counterclaim interposed by him, he must demand the judgment in his answer.

Sec. 398. Where the answer of the defendant, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court upon the plaintiff's motion, may, in its discretion, order that the action be severed; thata judgment be entered for the plaintiff for the part so admitted; and, if the plaintiff so elects, that the action be continued, with like effect, as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim. The order must prescribe the time and manner of the plaintiff's election. If the plaintiff elects to continue the action, his right to costs upon the judgment is the same, as if it was taken in an action brought for only that part of the claim. If the plaintiff does not elect to continue the action, costs must be awarded, as upon final judgment in any other case.

Sec. 399. In an action upon contract, where the complaint demands judgment for a sum of money only, if the defendant, by his answer, does not deny the plaintiff's claim, but sets up a counterclaim amounting to less than the plaintiff's claim, the plaintiff upon filing with the clerk an admission of the counterclaim, may take judgment for the excess, as upon a default for want of an answer. The admission must be made a part of the judgment roll.

CHAPTER V.

DEMURRER TO ANSWER.

Section 403. When plaintiff may demur to answer.
" 404. Grounds of demurrer.
" 405. Plaintiff may demur to whole answer or to one or more defences.
" 406. When plaintiff may demur to answer.
" 407. Demurrer to counter-claim.
" 408. Must specify grounds.

Sec. 403. The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant, or to one or more of the several defences or counterclaims set up in the answer.

Sec. 404. The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined.

2. That the answer does not state facts sufficient to constitute a defense or counterclaim.

3. That the answer is ambiguous, unintelligible, or uncertain.

Sec. 405. The plaintiff may demur to the whole answer, or to one or more separate defences or counterclaims stated therein. In the latter case he may reply to the defences or counterclaims not demurred to.

Sec. 406. The plaintiff may demur to a counterclaim or a defence consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof.

Sec. 407. The plaintiff may also demur to a counterclaim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto appear on the face of the counterclaim:

1. That the court has not jurisdiction of the subject thereof.
2. That the defendant has not legal capacity to recover upon the same.
3. That there is another action pending between the same parties, for the same cause.
4. That the counterclaim is not of the character specified in Section 387, of this Code.
5. That the counterclaim does not state facts sufficient to constitute a cause of action.

Sec. 408. A demurrer, taken under the last section, must distinctly specify the objections to the counterclaim; otherwise it may be disregarded. The mode of specifying the objections is the same, as where a demurrer is taken to a complaint.

CHAPTER VI.

REPLY.

Section 411. What reply to contain.
" 412. Same.
" 413. Failure to reply.
" 414. Demurrer to reply.

Sec. 411. Where the answer contains a counter-claim, the plaintiff, if he does not demur, may within twenty days after service of the answer, reply to the counterclaim. The reply must contain a general or specific denial of each of the material allegations of the counterclaim, controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the counterclaim, and also a general denial of all the allegations of the counter-claim not specifically admitted or denied in the reply; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defence to the counter-claim.

Sec. 412. A reply may contain two or more distinct avoidances of the same defence or counterclaim, but they must be separately stated and numbered.

Sec. 413. If the plaintiff fails to reply or demur to the counterclaim, the defendant shall be entitled to the same relief, as a plaintiff upon the failure of defendant to demur to or answer the complaint.

Sec. 414. The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defence or counterclaim, contained in the reply, on the ground that it is insufficient in law upon the face thereof.

CHAPTER VII.

VERIFICATION OF PLEADINGS.

Section 417. Pleadings must be subscribed.
" *418. Verification of pleadings.*

Sec. 417. Every pleading must be subscribed by the party or his attorney.

Sec. 418. All complaints, answers, and replies must be verified as provided in this section, except that when an admission of the truth of the allegation might subject the party to a prosecution for felony or misdemeanor, or when the action or defence is in behalf of the State, county, or a subdivision thereof, or a municipal corporation, the verification may be omitted.

The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent, except as to the matters therein stated on information and belief, and that as to those he believes it to be true.

Such verification must be made by the party, or if there are several parties united in interest or pleading, by one at least of such parties acquainted with the facts, if such party is in the county and capable of making the affidavit. The verification may also be made by the agent or attorney of the party, if the party is absent from the county where the attorney resides; or is from any other cause unable to verify the pleading, and in such case the verification must state that the deponent is the agent or attorney of the party, and the reason why such verification is made by such agent or attorney, and that the matters stated in the pleading are true to the best knowledge, information and belief of such agent or attorney.

When a corporation is a party, the verification may be made by any officer thereof, and must state what officer he is, and that the matters stated therein are true to the best knowledge, information and belief of such officer. If there is no officer of the corporation within the county, the verification may be made by its attorney.

CHAPTER VIII.

GENERAL RULES OF PLEADING.

Section 424. Pleadings to be liberally construed.
" *425. Frivolous pleadings; how disposed of.*
" *426. Sham or irrelevant pleadings.*

Section 427. Account, how pleaded.
" *428. Description of real property.*
" *429. Pleading, judgment, etc.*
" *430. Condition precedent.*
" *431. Instrument for the payment of money only.*
" *432. Copy of written instrument in pleading.*
" *433. Pleading statute of limitations.*
" *434. Pleading private statutes.*
" *435. Libel and slander.*
" *436. Same.*
" *437. Copy of answer on co-defendant, when.*
" *438. Allegation not denied, when deemed true.*
" *439. Construction of not "sufficient knowledge," etc.*
" *440. Material allegation, what is.*
" *441. Supplemental pleading.*
" *442. Pleadings filed and served.*

Sec. 424. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

Sec. 425. If a demurrer, answer, or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party, of not less than five days, may apply to the court or to a judge of the court for judgment thereupon, and judgment may be given accordingly. If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party. Costs may be awarded in the discretion of the court.

Sec. 426. Sham and irrelevant answers and replies, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose.

Sec. 427. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days, or such further time as the court may allow, or may be agreed to by the parties, after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular.

Sec. 428. In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer upon execution to identify it.

Sec. 429. In pleading a judgment, or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.

Sec. 430. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.

Sec. 431. Where a cause of action, defence, or counterclaim, is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth the instrument according to its legal effect.

Sec. 432. The insertion in a pleading of a copy of a written instrument is equivalent to setting forth the instrument according to its legal effect.

Sec. 433. In pleading the statute of limitations, it is not necessary to state the facts showing the defence, but it may be stated generally that the cause of action is barred by the provision of section —— (giving the number of the section and subdivision thereof, if it is so divided, relied upon), of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

Sec. 434. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court thereupon shall take judicial notice thereof.

Sec. 435. In an action for libel and slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken.

Sec. 436. In the actions mentioned in the last section, the defendant may, in this answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Sec. 437. Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer.

The controversy between the defendants must not delay a judgment, to which the plaintiff is entitled, unless the court otherwise directs.

Sec. 438. Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party.

Sec. 439. An allegation that the party has not sufficient knowledge or information to form a belief, with respect to a matter, must, for all purposes, including a criminal prosecution, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

Sec. 440. A material allegation in a pleading is one essential to the claim or defence, and which could not be stricken from the pleading without leaving it insufficient.

Sec. 441. The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the cause occurring after the former complaint, answer or reply.

Sec. 442. All pleadings subsequent to the complaint must be filed with the clerk, and copies thereof served upon the adverse party or his attorney.

CHAPTER IX.

VARIANCE—MISTAKES IN PLEADINGS AND AMENDMENTS.

Section 446. Material variances, how provided for.
" *447. Immaterial variances, how provided for.*
" *448. When not to be deemed a variance.*
" *449. Amendments of course, and effect of demurrer.*
" *450. Amendments by the court. Enlarging time to plead and relieving from judgments, etc.*
" *451. Sureties in answer may state true value of property.*
" *452. Amendments in certain cases.*
" *453. Suing a party by a fictitious name, when allowed.*
" *454. No error or defect to be regarded unless it affects substantial rights.*
" *455. Time for answer.*

Sec. 446. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits. Whenever it appears that a party has been so misled, the court may order the pleadings to be amended, upon such terms as may be just.

Sec. 447. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Sec. 448. Where, however, the allegation of the claim or defence, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

Sec. 449. Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or twenty days after demurrer and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have twenty days thereafter in which to answer, reply or demur to the amended pleading.

Sec. 450. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer, reply or demurrer. The court may likewise, in its discretion, after notice to or in the presence of the adverse party, allow upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and upon like terms allow an answer to be made after the time limited by this Code; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; *Provided*, that application therefor be made within reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. When from any cause the summons in an action has not been personally served on the defendant, the court may allow on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action.

Sec. 451. When in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affiidavit was made, or that the value in the affiidavit stated was inserted by mistake, the court must disregard the value as stated in the affidavit.

Sec. 452. Upon the decision of a demurrer, the court may in its discretion, allow the party in fault to plead anew or amend, upon such terms as are just. If a demurrer to a complaint is allowed, because two or more causes of action have been improperly united, the court may, in its discretion, and upon such terms as are just, direct that the action be divided into as many actions as are necessary for the proper determination of the causes of action therein stated.

Sec. 453. When the plaintiff is ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleadings or proceedings may be amended accordingly. It is sufficient in all actions, papers, pleadings or proceedings to designate any party or person by the initial letter or letters, or some contraction of the Christian or first name or names, instead of stating the Christian or first name in full.

Sec. 454. The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

Sec. 455. When a demurrer to any pleading is sustained or overruled, and time to amend, answer or reply is given, the time so given runs from service of notice of the decision or order, except when the party against whom the decision is made is in court. In such case the time runs from the making of the decision or order,

TITLE VII.

PROVISIONAL REMEDIES IN CIVIL ACTIONS.

Chapter I. Arrest and Bail.
“ *II. Claim and Delivery of Personal Property.*
“ *III. Injunction.*
“ *IV. Attachment.*
“ *V. Attachment of Live Stock on Ranges.*
“ *VI. Receivers.*
“ *VII. Deposit in Court.*

CHAPTER I.

ARREST AND BAIL.

Section 461. No person to be arrested in civil action except.
“ *462. When defendant may be arrested in a civil action.*
“ *463. Order of arrest.*
“ *464. When order made, undertaking therefor.*
“ *465. Justification of sureties.*
“ *466. When order made and what to require.*
“ *467. How order to be served on defendant.*
“ *468. How order executed, expense of keeping defendant.*
“ *469. Defendant discharged upon giving bail.*
“ *470. Bail, form of undertaking.*
“ *471. Bail may surrender defendant.*

Section 472. *When and how defendant may be surrendered.*
" 473. *Action against bail.*
" 474. *Bail exonerate, how.*
" 475. *Return of undertaking, exception to bail.*
" 476. *Notice of justification of bail, new undertaking.*
" 477. *Qualification of bail.*
" 478. *Justification of bail.*
" 479. *Bail found sufficient, to be allowed and sheriff exonerated.*
" 480. *Deposit of money instead of bail.*
" 481. *May deposit with sheriff, clerk to give two certificates.*
" 482. *Bail given, deposit refunded.*
" 483. *Money deposited, how disposed of.*
" 484. *Sheriff liable for escape.*
" 485. *Sheriff's official bond liable.*
" 486. *Proceedings to vacate order or reduce bail.*
" 487. *When order vacated or bail reduced.*

Sec. 461. No person shall be arrested in a civil action, except as prescribed by this Chapter.

Sec. 462. The defendant may be arrested in the following cases:

1. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors; or when the action is for willful injury to person, to character, or to property, knowing the property to belong to another.

2. In an action for a fine or penalty; or for money or property embezzled, or fraudulently misapplied or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment, or for a willful violation of duty.

3. In an action to recover possession of personal property unjustly obtained, when the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found, or taken by the sheriff.

4. When the defendant has been guilty of fraud in contracting the debt, incurring the obligation for which the action is brought, or in concealing or disposing of the property, or for taking, detention, or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

Sec. 463. An order for the arrest of the defendant must be obtained from the judge of the court in which the action is brought.

Sec. 464. The order must be made whenever it shall appear to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in Section 462. Before making the order the judge must require a written undertaking on the part of the plaintiff, with at least two sufficient sureties, to the effect that, if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an order of arrest, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars.

Sec. 465. Each of the sureties must annex to the undertaking an affidavit that he is a resident and householder, or freeholder, within the State, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking must be filed with the clerk of the court.

Sec. 466. The order may be made at the time of issuing the summons, or at any time afterwards, before judgment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest him, and hold him to bail in a specified sum, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending.

Sec. 467. The order of arrest with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy of the affidavit and also, if defendant desires, a copy of the order of arrest.

Sec. 468. The sheriff must execute the order by arresting the defendant, and keeping him in custody until discharged by law. But the sheriff is not bound to keep such person under arrest more than twenty-four hours, unless the plaintiff advance each day the expense of keeping such person; which expense shall be taxed as costs in the action, and in no case shall be a charge against the county.

Sec. 469. The defendant, at any time before execution, is discharged from arrest, either upon giving bail or upon depositing the amount mentioned in the order as provided in this Chapter.

Sec. 470. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

Sec. 471. At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested.

Sec. 472. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon arrest of the defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail shall be exonerated; *Provided*, Such arrest, delivery or surrender, take place before the expiration of ten days after judgment; but if such arrest, delivery or surrender be not made within ten days after judgment, the bail shall be finally charged on their undertaking, and be bound to pay the amount of the judgment within ten days thereafter.

Sec. 473. If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of such original judgment.

Sec. 474. The bail must also be exonerated by the death of the defendant, or his imprisonment in a State penitentiary or prison; or by his legal discharge from the obligation to render himself amenable to the process.

Sec. 475. Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession, until filed as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them, and the sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.

Sec. 476. Within five days after receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the place of residence and occupation of the latter), before a judge of the court, or clerk thereof, at a specified time and place; the time not to be less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there shall be a new undertaking.

Sec. 477. The qualifications of bail shall be as follows:

1. Each of them must be a resident and householder, or freeholder, within the county.

2. Each must be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this Chapter, over and above all his debts and liabil-

ities, exclusive of property exempt from execution; but the judge or clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Sec. 478. For the purpose of justification, each of the bail must attend before the judge or clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency in such manner as the judge or clerk, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Sec. 479. If the judge or clerk shall find the bail sufficient he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff shall thereupon be exonerated from liability.

Sec. 480. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of bail be reduced, as provided in this Chapter, the defendant may deposit such amount instead of giving bail. In either case the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged from custody.

Sec. 481. The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiving the same, two certificates of such payment, the one of which he must deliver or transmit to the plaintiff or his attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited, as in other cases of delinquency.

Sec. 482. If money be deposited as provided in the last two sections, bail may be given and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

Sec. 483. Where money shall have been deposited, if it remain on deposit at the time of recovery of a judgment in favor of the plaintiff, the clerk must, under direction of the court, apply the same in satisfaction thereof; and after satisfying the judgment, must refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk must, under direction of the court, refund him the whole sum deposited and remaining unapplied.

Sec. 484. If, after being arrested, the defendant escape or be rescued, the sheriff is liable as bail, but he may discharge himself from such liability by the giving and justification of bail at any time before judgment.

Sec. 485. If a judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied in whole or in part, the same proceeding may be had on his official bond for the recovery of the whole or any deficiency, as in other cases of delinquency.

Sec. 486. A defendant arrested may, at any time before justification of bail, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice to the plaintiff, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs in addition to those on which the order of arrest was made.

Sec. 487. If, upon such application, it satisfactorily appears that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appears that the bail was fixed too high, the amount shall be reduced.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

Section 500. Plaintiff may claim delivery.
“ *501. Affidavit.*
“ *502. Requisition.*
“ *503. Undertaking and duty of sheriff.*
“ *504. Exception to sureties.*
“ *505. Property to be returned in good condition.*
“ *506. Action if property injured.*
“ *507. Duty of officer.*
“ *508. Sureties not released by second undertaking.*
“ *509. Defendant may require return of property.*
“ *510. Justification of defendant's sureties.*
“ *511. Qualification of sureties.*
“ *512. Proceedings if property concealed.*
“ *513. Duty of sheriff.*
“ *514. Claimed by third persons.*
“ *515. Papers to be filed.*
“ *516. Description of property.*
“ *517. Sheriff may take less.*
“ *518. Title in third person.*
“ *519. Damages on default.*

Sec. 500. The plaintiff, in an action to recover possession of personal property, may, at the time of issuing summons, or at any time before answer, claim the delivery of such property to him, as provided in this Chapter.

Sec. 501. When a delivery is claimed, an affidavit must be made by the plaintiff, or some one in his behalf, stating:

1. That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof.

2. That the property is wrongfully detained by the defendant.

3. That the same has not been taken for a tax, assessment, or fine, pursuant to statute, or seized under an execution or an attachment against the property of the plaintiff, or if so seized that it is by statute exempt from seizure; and,

4. The actual value of the property.

Sec. 502. The plaintiff or his attorney may thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant.

Sec. 503. Upon receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit for the prosecution of the action and for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody.

He must also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or, if neither have any known place of abode, by putting them in the nearest postoffice, directed to the defendant.

Sec. 504. The defendant may, within two days after service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the securities. If he fails to do so, he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties must justify on notice, in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot claim the property, as provided in Section 509.

Sec. 505. In all cases when a judgment is rendered in an action to recover the possession of personal property for the return thereof, or its value in case a return cannot be had, it is the duty of the party against whom such judgment shall be rendered to return the same in as good condition as the same was when possession thereof was taken by him.

Sec. 506. In case such property, while in the possession of the party against whom such judgment shall be rendered, or while the same is unlawfully detained from the party entitled to the possession thereof, be materially injured or lessened in value by use or otherwise, then a return or offer to return shall not be deemed a compliance with the undertaking given for its return, but an action may be maintained for the value thereof as assessed by the jury or court, and damages for its detention.

Sec. 507. In case such action to recover possession of personal property is brought against any sheriff or other officer who may have levied upon and seized the same under authority of any attachment or other process, and judgment shall be rendered in favor of such officer, for the return of the property, the party against whom such judgment is rendered may nevertheless make return of said property, notwithstanding the same may have been injured or lessened in value, and thereupon it is the duty of such officer to immediately advertise the same for sale as in cases of sales of property under execution, and apply the proceeds of the sale thereof, after paying the costs, towards the payment and satisfaction of any judgment that may have been rendered.

Sec. 508. Such second taking of such property referred to in the preceding section does not release or discharge the sureties on any undertaking given for the return of such property, but an action may be maintained on such undertaking and recovery thereon had, unless the property shall have been actually returned in accordance with the judgment rendered.

Sec. 509. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within five days after the taking and serving notice to the defendant, it shall be delivered to the plaintiff, except as provided in Section 514.

Sec. 510. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than five days, shall justify before the judge or clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time or place appointed, he shall deliver the property to the plaintiff.

Sec. 511. The qualification of sureties and their justification shall be such as are prescribed by this Title in respect to bail upon an order of arrest.

Sec. 512. If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of the county.

Sec. 513. When the sheriff shall have taken property, as in this Chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

Sec. 514. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right of the possession thereof, stating the grounds of such right or title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent, indemnify the sheriff against such claim by an undertaking by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless so made.

Sec. 515. The sheriff shall file the notice, undertaking and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

Sec. 516. Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity, as nearly as can be ascertained. Where it describes two or more chattels, it may, at the election of the plaintiff, state the aggregate value of all; or, separately, the value of any chattel or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels or classes of chattels, the defendant may require, as prescribed in this Chapter, the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of the portion thereof which has been taken. If he procures such a return, the remainder must be delivered to the plaintiff, except as is otherwise prescribed in this Chapter.

Sec. 517. The sheriff must take a less number or quantity, if the whole of the property described in the affidavit cannot be found.

Sec. 518. The defendant may by answer defend, on the ground that a third person was entitled to the property, without connecting himself with the latter's title.

Sec. 519. Where the plaintiff is entitled to judgment by default, for want of an appearance or pleading, the court to which he applies for judgment may ascertain and determine the damages to which he is entitled, and the value of the property, if necessary; or may direct a reference for that purpose.

CHAPTER III.

INJUNCTION.

Section *525. Injunction order.*
" *526. Injunction, when granted.*
" *527. Injunction, at what time granted, and on what papers, who may serve.*
" *528. When notice required.*
" *529. Security upon injunction.*
" *530. Order to show cause.*
" *531. New undertaking may be required.*
" *532. Verified answer only affidavit.*
" *533. Application to dissolve.*
" *534. Dissolution or modification.*
" *535. Costs may be awarded.*
" *536. Injunction order as to corporation.*

Sec. 525. An injunction is an order requiring a person to refrain from a particular act. The order may be granted by the court in which the action is brought, or by a judge thereof, and when made by a judge be enforced as the order of the court.

Sec. 526. An injunction order may be granted in the following cases:

1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff.

3. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

4. When it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition.

Sec. 527. The injunction order may be granted at the time of issuing the summons upon the complaint, or at any time afterward before judgment, upon affidavits. In the one case, the complaint with or without affidavits to support it, and, in the other, the affidavits shall show satisfactorily that sufficient grounds exist therefor. An injunction order shall not be granted on the complaint alone, unless:

1. It be duly verified.

2. The material allegations of the complaint setting forth the grounds therefor, be made positively and not upon information and belief.

When granted on the complaint, a copy thereof, including the verification, shall be served with the injunction order when granted upon the complaint, with affidavits to support it, or upon affidavits alone, a copy of the affidavits likewise shall be served with the injunction order. Any person qualified to serve a summons may serve the order and affidavits.

Sec. 528. The order may be granted, upon or without notice, in the discretion of the court or judge, unless the defendant has answered, in which case, it can be granted only upon notice, or an order to show cause. Where an application for an injunction is made upon notice, or an order to show cause, either before or after answer, the court or judge may enjoin the defendant, until the hearing and decision of the application, by an order which is called a restraining order. In no case shall an injunction order or restraining order be issued without notice unless it appears to the court or judge, that irreparable injury would result by the delay of giving notice.

Sec. 529. On granting an injunction or restraining order, the court or judge may require, except when the State, a county, or any subdivision thereof, or municipal corporation, or a married woman in a suit for a divorce against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objection to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or clerk in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved.

Sec. 530. If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place, why the injunction should not be granted, and the defendant may in the meantime be restrained. Cause may be shown upon affidavits or oral testimony.

Sec. 531. Upon the hearing of an application to vacate or modify an injunction order, or on a hearing to show cause, the court or judge may require a new undertaking, in the same or a different sum, to be given by the plaintiff, with like sureties, and to the like effect, as upon granting of the original order. The persons executing the new undertaking become liable thereon, as if they had executed it upon the granting of the original order. The persons who executed the original undertaking remain liable thereon until the new undertaking is given and approved, and no longer. Upon such hearing the court or judge may, where the alleged wrong or injury is not irreparable and is capable of being adequately compensated for in money, vacate the injunction order upon the defendant's executing an undertaking in such form and amount and with such sureties as the court or judge shall direct, conditioned to indemnify the plaintiff against loss sustained by reason of vacating such injunction order.

Sec. 532. Upon the hearing of a contested application for an injunction order, or to vacate or modify such an order, a verified answer has the effect only of an affidavit.

Sec. 533. If an injunction order be granted without notice, the defendant, at any time before the trial, may apply upon reasonable notice, or upon an order to show cause returnable at a specified time or forthwith, after service thereof, to the judge who granted the injunction order, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and affidavit on which the injunction order was granted, or upon affidavit on part of defendant, with or without the answer. If the application be made upon affidavits on part of defendant, but not otherwise, the plaintiff may oppose the same by affidavits or oral testimony, in addition to those on which the injunction order was granted. The defendant may also use oral testimony.

Sec. 534. If, upon such application, it satisfactorily appear that there is not sufficient ground for the injunction order, it shall be dissolved; or, if it satisfactorily appear that the extent of the injunction order is too great, it shall be modified.

Sec. 535. Where an injunction order is granted without notice, and the same is afterwards dissolved upon application of the party enjoined thereby, the court or judge to whom the application to dissolve is made, may award as costs of the application against the plaintiff, and in favor of the party applying, such sum as to the court or judge may appear just, not less than ten dollars, nor more than one hundred dollars.

Sec. 536. An injunction order to suspend the general and ordinary business of a corporation must not be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the State is a party to the action.

CHAPTER IV.

ATTACHMENT.

Section 542. When attachment may issue.
“ *543. Affidavit, what to contain.*
“ *544. Undertaking.*
“ *545. Writ, to whom directed and what to contain.*
“ *546. Shares of stock and debts due defendant, how attached and disposed of.*
“ *547. How real and personal property shall be attached.*
“ *548. Certificate of defendant's interest to be furnished.*
“ *549. Persons refusing certificates to be examined.*
“ *550. Sheriff to take into his possession books, etc.*
“ *551. Attorney to give written instructions.*
“ *552. Garnishment, when garnishee liable to plaintiff.*
“ *553. Citation to garnishee.*
“ *554. Inventory, how made.*
“ *555. Perishable property, how sold.*
“ *556. Property attached may be sold as under execution.*
“ *557. Application for order to sell.*
“ *558. Property claimed by third persons.*
“ *559. Death does not dissolve attachment.*
“ *560. If plaintiff obtains judgment, how satisfied.*
“ *561. When there remains a balance due, how collected.*
“ *562. When suits may be commenced on the undertaking.*
“ *563. If the defendant recover judgment, what the sheriff is to deliver.*
“ *564. Proceedings to release attachment, before whom taken.*
“ *565. Attachment, in what cases it may be released and upon what property.*
“ *566. When a motion to discharge attachment may be made and upon what ground.*
“ *567. When motion made on affidavit it may be opposed by affidavit.*
“ *568. When writ must be discharged.*
“ *569. Motion to vacate or modify writ or increase security.*
“ *570. How motion made.*
“ *571. When writ to be returned.*
“ *572. Different attachments, when liens accrue.*

Section 573. Partners may apply to discharge attachment.
" *574. Undertaking to be given.*
" *575. Property mortgaged and pledged, how taken.*
" *576. Attachment book.*
" *577. Public officers cannot be garnished.*

Sec. 542. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as is in this Chapter provided, as follows:

In an action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless.

Sec. 543. The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of the plaintiff, showing:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal counterclaims) upon a contract, express or implied, for the direct payment of money, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; and,

2. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.

Sec. 544. Before issuing the writ the clerk must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, to be approved by the clerk, in a sum not less than double the amount claimed by the plaintiff, if such amount be one thousand dollars or under, or in case the amount so claimed by plaintiff shall exceed one thousand dollars, then in a sum equal to such amount, but in no case shall an undertaking be required exceeding in amount the sum of ten thousand dollars. The condition of such undertaking shall be to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the attachment, not exceeding the sum specified in the undertaking. Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two days nor more than five days, must justify before a judge of the District Court, or before the clerk thereof, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment.

Sec. 545. The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demands, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties. In no case shall the sheriff attach more property than appears necessary to satisfy the plaintiff's demand.

Sec. 546. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, and all debts due such defendant, and all other property in this State of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

Sec. 547. The sheriff to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in Section 545 be not given, as follows:

1. Real property standing upon the records of the county in name of the defendant must be attached by filing with the county clerk a copy of the writ, together with the description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached.

2. Real property, or an interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the county clerk a copy of the writ, together with a description of the property, and a notice that such real property and any interest of the defendant therein, held by or standing in the name of such other person (naming him), are attached, and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with the similar description.

and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The county clerk must index such attachment when filed, in the names both of the defendant and of the person by whom the property is held, or in whose name it stands on the record.

3. Personal property, capable of manual delivery, must be attached by taking it into custody.

4. Stocks or shares, or interest in stocks or shares, of any corporation or company must be attached by leaving with the president or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

5. Debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debt, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control belonging to the defendant, are attached in pursuance of such writ.

Sec. 548. Upon the application of a sheriff, holding a writ of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying his right to a number of shares of the defendant, in the stock of the association or corporation, with all dividends declared, or incumbrances thereon; or the amount, nature and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

Sec. 549. If a person to whom application is made, as prescribed in the last section, refuses to give such a certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, that there is reason to suspect that a certificate given by him is untrue, or that it failed fully to set forth the facts, required to be shown thereby, the court or judge may make an order, directing him to attend, at a specified time, and at a place within the county to which the writ is issued, and submit to an examination under oath, concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein.

Sec. 550. The sheriff must take into his custody all books of account, vouchers, and other papers, relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep. The sheriff, to whom the writ of attachment is delivered, may levy, from time to time, and as often as is necessary, until the amount for which it was issued has been secured.

Sec. 551. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ and a notice that such credit, or other property, or debts, as the case may be, are attached, in pursuance of said writ.

Sec. 552. All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

Sec. 553. Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend, for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property, capable of manual delivery in the hands or under the control of such person or of the defendant, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

Sec. 554. The sheriff must make a full inventory of the property attached, and return the same with the writ. When the sheriff has levied several writs of attachment on the same property only one inventory must be made. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the person owing the debt or having the credit, to give him a memorandum stating the amount and description of each; and if such memorandum be refused the sheriff may apply upon one day's notice to the court or judge for an order to compel such memorandum to be given. If the order be granted it shall also direct the payment of costs of the motion by the person refusing.

Sec. 555. If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment, recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid.

Sec. 556. Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or a judge thereof that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action.

Sec. 557. Application for the order shall be upon such notice to the adverse party or his attorney as the court or judge considering the nature and condition of the property may direct. If it shall appear to the court or judge that the delay necessary to give notice would cause a material depreciation in the value of property, the order may be made without notice.

Sec. 558. If personal property attached be claimed by a third person he shall give notice thereof to the sheriff, and deliver to him an affidavit stating his claim, ownership, and a description of the property, and unless the plaintiff within ten days after receiving notice thereof give the sheriff a good and sufficient bond to indemnify him against loss or damage by reason of retaining said property, the sheriff shall deliver the same to such person.

Sec. 559. The death of the defendant does not release the attached property and a lien of the attachment may be enforced as in the case of other liens.

Sec. 560. If judgment be recovered by plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant or claimant as hereinbefore provided, or subjected to execution on another judgment, recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property, or property ordered by the court or judge to be sold by him, or of any debts or credits collected by him, or so much thereof as shall be necessary to satisfy the judgment;

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

Sec. 561. If, after selling all property attached by him remaining in his hands and applying the proceeds, together with the proceeds of any debt or credits collected by him, deducting his fee, to the payment of the judgment, any balance that shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of property attached unapplied on the judgment.

Sec. 562. If the execution is returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to Section 545, or Section 565, or he may proceed as in other cases upon the return of an execution.

Sec. 563. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all of the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent; the order of attachment shall be discharged and the property released therefrom.

Sec. 564. Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part, and upon the execution of the undertaking mentioned in the next section, an order may be made, releasing from the operation of the attachment any or all of the property attached; and all of the property so released, and all of the proceeds of the sale thereof, must be delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff.

Sec. 565. Before making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties residents and freeholders, or householders, in the State, to the effect that in case the plaintiff recover judgment in the action, the defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making the order may fix the sum for which the undertaking shall be executed, and if necessary in fixing the such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification, if the same be required.

Sec. 566. The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

Sec. 567. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

Sec. 568. If, upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged. But the court or judge may allow the plaintiff to amend his affidavit or undertaking.

Sec. 569. The defendant, or a person who has acquired a lien upon, or interest in his property, after it was attached, may, at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to vacate or modify the writ of attachment, or to increase the security given by the plaintiff, or for one or more of those forms of release, together, or in the alternative.

Sec. 570. An application, specified in the last section, may be founded only upon the papers upon which the writ was granted; in which case it must be made to the court or judge, with or without notice, as the court or judge deems proper, or it may be founded upon proof, by affidavits, on the part of the defendant, or a person who has acquired a lien upon or interest in his property after it was attached, in which case it must be made to the court or judge upon notice; and it may be opposed by new proof, by affidavit or other evidence on the part of the plaintiff, tending to sustain any grounds of attachment.

Sec. 571. The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto; and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order must be filed in the office of the county clerk in which the notice of the attachment has been filed, and be indexed in like manner.

Sec. 572. All liens by attachment shall accrue at the time the property of the defendant shall be attached by the officer charged with the execution of the writ, in the order in which the writs are levied; and said lien shall not be affected by any subsequent attachment, or by any judgment obtained subsequent thereto.

The writ of attachment first placed in the hands of the sheriff must be executed first, and when there are several writs against the same defendant, they must be executed in the order in which they were received by the sheriff. No written specification of property to be levied upon must be required by the sheriff, except as to property referred to in Section 551 and Subdivision 2, of Section 547. The sheriff must indorse upon each writ of attachment received by him the time when the same was received, specifying the day, hour and minute.

Sec. 573. If a writ of attachment is levied upon the interest of one or more partners, in goods or property of a partnership, the other partners, who are not defendants in the action, or any of them, may, at any time before final judgment, apply to the judge who granted the writ, or to the court, upon an affidavit showing the facts, for an order to discharge the attachment, as to that interest.

Sec. 574. Upon such an application, the applicant must give an undertaking, with at least two sufficient sureties, to the effect that they will pay to the sheriff, on demand, the amount of any judgment, which may be recovered against the partner who is defendant in the action; or which may be recovered against him, in any other action, wherein the other partners are not defendants, and wherein a writ of attachment, or an execution, may come into the sheriff's hands, at any time before the writ of attachment, which was so levied, is vacated and annulled; not exceeding the sum specified in the undertaking, which must not be less than the value of the interest of the defendant, in the goods or property seized, by virtue of the attachment, as fixed by the court or judge. If the value, in the opinion of the court or judge, is uncertain, the sum must be such as the court or judge determines. For the purpose of fixing the sum or to determine the sufficiency of its sureties, the court or judge may receive affidavits for oral testimony, or may direct a reference.

Sec. 575. Personal property mortgaged or pledged may be taken on attachment, as provided in Section 2449, of the Civil Code.

Sec. 576. There must be kept in the office of the county clerk of each county, a book called "Attachment Book," in which must be entered by such clerk, in alphabetical order, the names of all persons against whom any writ or notice of attachment has been filed in his office. There must also be entered in said book the time such writ or notice was filed. Such entry must be made under an appropriate head for that purpose.

Sec. 577. No credit, or money due or to become due, of or to any person in the possession or under the control of a public officer or board, including all the officers of a municipal corporation, must be attached or garnished while in such possession or under such control, and no attachment can be made until the money or a warrant or other evidence of indebtedness therefor, has been delivered to the owner of the same, or to some one for his use.

CHAPTER V.

ATTACHMENT OF LIVE STOCK ON RANGES.

Section 580. Range stock, how it may be attached.
" *581. Possession under a mortgage, how acquired.*
" *582. Time attachment holds good, limited.*
" *583. Duties of county clerk to record attachment.*
" *584. How a subsequent attachment may be made.*

Sec. 580. Whenever it is necessary for an officer or person charged with the service of process out of any of the courts of this State to take possession of any cattle or horses running at large and commonly known as range stock, between the first day of November and the next succeeding fifteenth day of May, it is a sufficient service of such process for the officer or person charged with the service of the same to file a copy thereof, with a notice appended thereto containing the number, as near as may be, and a description of said stock by marks and brands, that such property or a portion thereof, as the case may be, is attached or levied upon, in pursuance of such process, with the county clerk of the county wherein such property is running at large, within fifteen days after the receipt of such process for service, and shall make due return of his said proceedings upon said process.

Sec. 581. In all cases where it is necessary under the laws of this State for a party to any mortgage, assignment, bill of sale, or other contract, between the first day of November and the next succeeding fifteenth day of May, to take possession of any such cattle or horses in order to preserve his rights under any such mortgage, assignment, bill of sale or other contract, it is sufficient for such party to file a copy of the instrument under which he claims, with a notice of such claim appended thereto, with the county clerk of the county wherein such property is running at large, within five days after it becomes nececessary for him to so take custody and possession of the same.

Sec. 582. When the copy of the process or instrument, with the proper notice appended thereto, is filed as hereinbefore provided, it has the same effect as if actual possession of said cattle and horses had been taken by the officer or person charged with the execution of such process, or the party required under said instrument to take the same, and shall continue to have such effect until actual possession of such property has been taken or had by the officer, person, or party aforesaid; *Provided*, That such actual possession be had or taken prior to the first day of August next succeeding.

Sec. 583. It is the duty of the county clerk to file all papers deposited with him for that purpose, and required to be filed under this Chapter, and preserve the same as other records of his office are preserved, and furnish to persons making inquiry about such files all necessary information concerning the same.

Sec. 584. When an officer into whose hands a writ of execution is placed has served the same in accordance with Section 580, of this Chapter, and made his return in accordance with the facts, at any time thereafter, within the time limited as hereinbefore provided to hold the property taken or levied upon under such writ, another writ of execution may be issued, which must be supplementary to the first writ, and in pursuance of which the officer or person charged with the service thereof may sell the property held by the said first writ, as hereinbefore provided.

CHAPTER VI.

RECEIVERS.

Section 590. Appointment of receiver.
" *591. Notice of appointment.*
" *592. Dissolution of corporations.*
" *593. Who shall not be appointed.*
" *594. Oath and undertaking.*
" *595. Powers of receivers.*
" *596. Funds, how invested.*

Sec. 590. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment, to carry the judgment into effect.

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

5. In cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

Sec. 591. Notice of an application for the appointment of a receiver, in an action, before judgment therein, must be given to the adverse party, unless he has failed to appear in the action, and the time limited for his appearance has expired; or unless it shall appear to the court that there is immediate danger that the property or fund will be removed beyond the jurisdiction of the court, or lost, materially injured, destroyed or unlawfully disposed of. The word property used in this Chapter, includes the rents, profits, or other income, and the increase of real or personal property.

Sec. 592. Upon the dissolution of any corporation, the District Court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders or members.

Sec. 593. No party, or attorney, or person interested in an action, can be appointed receiver therein, without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an *ex parte* application, the court, before making the order, may require from the applicant an undertaking with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause, and the court may, in its discretion, at any time after said appointment, require an additional undertaking.

Sec. 594. Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person, and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. The court mny at any time remove a receiver or direct him to give new bonds with new sureties with the like effect. Such undertaking may be sued on as provided in Section 607, of the Political Code.

Sec. 595. The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

Sec. 596. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made except upon the consent of all the parties to the action.

CHAPTER VII.

DEPOSIT IN COURT.

Section 600. Deposit in Court.
" *601. Money paid to clerk must be deposited with county treasurer.*
" *602. Manner of enforcing the order.*

Sec. 600. When it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same upon motion to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Sec. 601. If the money is deposited in court, it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safe keeping of the money deposited with the treasurer his official bond shall be security.

Sec. 602. Where the court has directed a deposit or delivery of money, or where a judgment directs a party to make a deposit or delivery, or to convey real property, if the direction is disobeyed, the court, besides punishing the disobedience as a contempt, may by order, require the sheriff to take, and deposit, or deliver the money or other personal property, or to convey the real property in conformity with the direction of the court.

CHAPTER VIII.

GENERAL AND MISCELLANEOUS PROVISIONS.

Section 605. Arrest, injunction, and attachment; when not to be granted together. When motions to be decided.
" *606. Defendant interposing counterclaim entitled to same provisional remedies as plaintiff.*

Sec. 605. Where an application for an order of arrest, an injunction order, and writ of attachment, or two of them, is made, in the same action, against the same defendant, and it satisfactorily appears that, under the particular circumstances of the case, two or all of them are not necessary for the plaintiff's security, the court or judge may, in its or his discretion, require the plaintiff to elect between them. Where an application is made to obtain, vacate, modify, or set aside an order of arrest, injunction order, or writ of attachment, the court or judge must finally decide the same, within twenty days after it is submitted for decision.

Sec. 606. Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same as in an action brought by him against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment; and for the purpose of applying to such a case the provisions of this Title, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counterclaim so set forth in the answer is deemed the complaint.

TITLE VIII.

TRIAL AND JUDGMENT IN CIVIL ACTIONS.

Chapter *I. Judgment in General.*
" *II. Judgment upon failure to answer.*
" *III. Issues—the modes of trial and postponements.*
" *IV. Trial by jury.*
" *V. Trial by the court.*
" *VI. References and trials by referees.*
" *VII. Provisions relating to trials in general.*
" *VIII. The manner of giving and entering judgment.*

CHAPTER I.

JUDGMENT IN GENERAL.

Section 612. Judgment defined.
" *613. Judgment may be for or against one of the parties.*
" *614. The judgment may be against one party and action proceed as to others.*
" *615. The relief to be awarded to the plaintiff.*
" *616. Action may be dismissed or non-suit entered.*
" *617. All other judgments are on the merits.*
" *618. Judgment for or against married woman.*
" *619. Effect of judgment dismissing complaint.*
" *620. Duty of sheriff.*

Sec. 612. A judgment is the final determination of the rights of the parties in an action or proceeding.

Sec. 613. Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment, it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors, or if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety.

Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Sec. 614. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

Sec. 615. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Sec. 616. An action may be dismissed or a judgment of nonsuit entered in the following cases:

1. By the plaintiff himself, at any time before trial, upon payment of costs; *Provided*, A counterclaim has not been made or affirmative relief sought by the answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2. By either party upon the written consent of the other.

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4. By the court, when upon the trial and before the submission of the case the plaintiff abandons it.

5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.

6. By the court, when after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months.

7. No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced, shall be dismissed by the court, in which the same shall have been commenced, on its own motion or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and served and return made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years.

The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register.

Sec. 617. In every case, other than those mentioned in the last section, judgment must be rendered on the merits.

Sec. 618. Judgment for or against a married woman may be rendered and enforced as if she were single.

Sec. 619. A final judgment, dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon its merits.

Sec. 620. Upon the dismissal or disposition of an action in which the court has jurisdiction of the subject matter of the action, it is the duty of the court to render such judgment for costs.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

Section 625. In what case judgment may be had upon the failure of the defendant to answer.

Sec. 625. Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the complaint, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in Section 356.

2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply to the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account be involved by a reference as above provided.

3. In an action where the service of summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court must there-

upon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the State, must require the plaintiff, or his agent, to be examined on oath respecting any payments that have been made to the plaintiff or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover.

CHAPTER III.

ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS.

Section 627. Issue defined, and the different kinds.
" *628. Issue of law, how raised.*
" *629. Issue of fact, how raised.*
" *630. Issue of law, how tried.*
" *631. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.*
" *632. Court may direct order.*
" *633. Counterclaim to be deemed an action within meaning of foregoing sections.*
" *634. Clerk must enter cause on the calendar, to remain until disposed of.*
" *635. Parties may bring issue to trial.*
" *636. Motion to postpone a trial for absence of testimony, requisites of.*
" *637. In cases of adjournment a party may have the testimony of any witness taken.*

Sec. 627. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Sec. 628. An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

Sec. 629. An issue of law must be tried by the court, unless it is referred upon consent.

Sec. 630. An issue of fact arises, in either of the following cases:

1. Upon a denial, contained in the answer, of a material allegation of the complaint; or upon an allegation, contained, in the answer, that the defendant has not sufficient knowledge or information to form a belief, with respect to a material allegation of the complaint.
2. Upon a similar denial or allegation, contained in the reply, with respect to a material allegation of the answer.
3. Upon a material allegation of new matter, contained in the answer, not requiring a reply; unless an issue of law is joined thereupon.

4. Upon a material allegation of new matter, contained in the reply; unless an issue of law is joined thereupon.

Sec. 631. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived or a reference is ordered as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must first be disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code.

Sec. 632. A separate trial, between the plaintiff and one or more defendants, of some or all of the issues of fact, or a trial of some or all the issues of law, or a change in the order of disposition of the issues, may be directed by the court, in its discretion.

Sec. 633. Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same, as if it arose in an action brought by the defendant against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment.

Sec. 634. The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar must remain upon the calendar until finally disposed of; but causes may be dropped from the calendar by consent of parties, and may be again restored upon notice, or may be stricken from the calendar by the court for want of prosecution.

Sec. 635. Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

Sec. 636. A motion to postpone a trial on grounds of the absence of evidence, shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed; and upon terms the court may, in its discretion, upon good cause shown, and in furtherance of justice, postpone a trial or proceeding upon other grounds than the absence of evidence.

Sec. 637. The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to to the same objections, as if the witnesses were produced.

CHAPTER IV.

TRIAL BY JURY.

Article I. Formation of jury.
" *II. Conduct of the trial.*
" *III. The verdict.*

ARTICLE I.

FORMATION OF THE JURY.

Section 640. Clerk to draw ballot.
" *641. Mode of drawing ballot.*
" *642. Persons drawn to form jury.*
" *643. Ballots drawn, when deposited in another box.*
" *644. When to be returned to box.*
" *645. Ballots of absentees returned to box.*
" *646. New jury may be drawn when another is impaneled.*
" *647. Ballots when drawn from Box No. 3.*
" *648. New panel no objection.*
" *649. Challenge.*
" *650. Challenge for cause.*
" *651. Challenge, how tried.*
" *652. Order of challenge.*
" *653. Vacancy to be filled.*
" *654. Form of oath.*

Sec. 640. When an issue of fact, to be tried by a jury, is brought to trial, the clerk, under the direction of the court, must openly draw, out of the trial juror box, as many of the ballots, one after another, as are sufficient to form a jury.

Sec. 641. Before the first ballot is drawn, the box must be closed and well shaken, so as thoroughly to mix the same; and the clerk must draw each ballot, without seeing the name written on any of them, through an aperture made in the lid of the box large enough only to admit his hand conveniently.

Sec. 642. The first twelve persons who appear, as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn, and constitute the jury to try the issue.

Sec. 643. The ballots containing the names of the jurors so sworn, must be then deposited in another box, and there kept apart from the other ballots until that jury is discharged.

Sec. 644. After the jury is discharged the ballots containing their names must be again rolled up or folded, as prescribed in Section 170, of this Code, and returned to the box, from which they were first taken; and the same course must be pursued as often as an issue is brought to trial by a jury.

Sec. 645. The ballot containing the name of a juror who is absent when his name is drawn or called, or is set aside, or excused from serving on that trial, must be again rolled up or folded in the same manner as before and returned to the box containing the undrawn ballots as soon as the jury is sworn.

Sec. 646 If an issue is brought to trial by a jury, while a jury is impaneled in another cause, and not then discharged, the court may order a jury for the trial of that issue, to be drawn out of the box containing the ballots then undrawn; but in any other case the ballots containing the names of all the trial jurors returned and attending the court must be placed together in the same box before a jury is drawn therefrom.

Sec. 647. If a sufficient number of jurors duly drawn and notified do not attend to form a jury, or a jury is impaneled in another cause and not discharged, the court shall, by an order to be entered in the minutes, direct the clerk to draw a sufficient number of ballots from Box No. 3, specified in Section 148, of this Code, to complete the jury. The sheriff must notify the persons thus drawn to attend forthwith, or at a time fixed by court. If for any reason a sufficient number of jurors to try the issue is not obtained, from the persons notified, under an order made as prescribed in this section, the court may make another order, or successive orders, until a sufficient number is obtained.

Each person so notified must attend at a time required by the notice, and, unless excused by the court or set aside, must serve as a juror upon the trial. For a neglect or refusal so to do, he may be fined in the same manner as a trial juror, regularly drawn, and notified, as prescribed in this Code; and he is subject to the same exceptions and challenges, as any other trial juror.

Sec. 648. It is not a valid objection to a jury, that it contains none of the jurors originally returned to the court, or is only partially composed of such jurors.

Sec. 649. Each party may challenge the jury or jurors as follows:

1. The panel or array.
2. For cause.
3. Peremptory.

There can be only one challenge on a side to the array or panel, which may be made by one or more of the parties. A challenge to the array or panel may be made and the whole array or panel set aside by the court when the jury was not selected, drawn, summoned or notified, as prescribed by law. Challenges to individual jurors are for cause or peremptory. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

Sec. 650. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this Code to render a person competent as a juror.
2. Consanguinity or affinity within the sixth degree to any party.
3. Standing in the relation of guardian and ward, master and servant, debtor or creditor, employer or clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party.
4. Having served as a juror or been a witness on a previous trial between the same parties, for the same cause of action.
5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.
6. Having an unqualified opinion or belief as to the merits of the action.
7. The existence of a state of mind in the juror evincing enmity against or bias in favor of either party.

Sec. 651. Challenges to the array or panel or for cause must be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.

Sec. 652. The plaintiff first, and afterwards the defendant, shall complete his challenges for cause.

Sec. 653. After each challenge sustained the vacancy shall be filled before further challenges are made, and any new juror introduced may be challenged for cause, or if the party shall not have exhausted the number of peremptory challenges to which he is entitled, he may be challenged peremptorily.

Sec. 654. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ———, the plaintiff, and ———, the defendant, and a true verdict render, according to the evidence.

ARTICLE II.

CONDUCT OF THE TRIAL.

Section 660. Order of proceedings on trial.
" *661. View by jury of the premises.*
" *662. Admonition when jury permitted to separate.*

Section 663. Jury may take with them certain papers.
“ *664. Deliberation of jury, how conducted.*
“ *665. May come into court for further instructions.*
“ *666. Proceedings in case a juror becomes sick.*
“ *667. When prevented from giving verdict, the cause may be again tried.*
“ *668. When jury are absent, court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.*
,‘ *669. Verdict, how declared. Form of. Polling the jury.*
“ *670. Proceedings when verdict is informal.*

Sec. 660. When the jury has been sworn, the trial shall proceed in the following order, unless the court for good cause and special reasons otherwise directs:

1. The party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it.

2. The adverse party may then, or at the opening of his case, briefly state his defence, and the evidence he expects to offer in support of it.

3. The party on whom rests the burden of the issues must first produce his evidence; the adverse party will then produce his evidence.

4. The parties will then be confined to rebutting evidence, unless the court, for good reason, in furtherance of justice, permits them to offer evidence in their original case.

5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the plaintiff must commence and may conclude the argument.

6. If several defendants, having separate defences, appear by different counsel, the court must determine their relative order in the evidence and argument.

7. When the evidence is concluded, or at any time before the case is finally submitted to the jury, if either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court. The court shall either give each instruction as requested, or positively refuse to do so, or give the instruction with a modification, and shall mark or indorse upon each instruction so offered in such manner so that it shall distinctly appear what instructions were given in whole or in part, and, in like manner, those refused. All instructions given by the court must be filed, together with those refused, as a part of the record.

8. When the argument is concluded the court shall charge the jury in writing, giving in connection therewith, such instructions as are offered and allowed. The charge of the court, the instructions given and the modifications thereof,

and the refusal to give instructions shall be deemed excepted to and no bill of exceptions shall be required.

9. In charging the jury, the court shall give to them all matters of law which it thinks necessary for their information in rendering a verdict.

Sec. 661. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place at which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, and one person representing each party, to the place, which shall be shown to them by the persons appointed by the court for that purpose. While the jury are thus absent, no person, other than the persons so appointed, shall speak to them on any subject connected with the trial, and such persons shall not speak to the jury upon any matters connected with the subject of the action, but may point out to the jury the property in litigation, or the place at which any material fact occurred.

Sec. 662. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Sec. 663. Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

Sec. 664. When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least two-thirds of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or two-thirds of them are agreed upon a verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

Sec. 665. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or taken down by the stenographer.

Sec. 666. If, after the impaneling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterward impaneled.

Sec. 667. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the case is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

Sec. 668. While the jury are absent the court may adjourn from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the case submitted to the jury until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day.

Sec. 669. When the jury, or two-thirds of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if upon such inquiry or polling, more than one-third of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete, and the jury discharged from the case.

Sec. 670. When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

ARTICLE III.

THE VERDICT.

Section 673. General and special verdicts defined.
" *674. When a general or special verdict may be rendered.*
" *675. Verdict in actions for recovery of money or on establishing counterclaims.*
" *676. Verdict in actions for the recovery of specific personal property.*
" *677. Entry of verdict.*

Sec. 673. The verdict of a jury is either general or special.

A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented, as that nothing shall remain to the court but to draw from them conclusions of law.

Sec. 674. In all cases the court may direct the jury to find a special verdict in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

In no case shall special issues be submitted to the jury when, in the opinion of the court, a general verdict would be sufficient.

Sec. 675. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counter claim for the recovery of money is established exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

Sec. 676. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property, (but failure to find all the facts mentioned in this section shall not invalidate the verdict,) and may at the same time assess the damages, if they are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

Sec. 677. Where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict in favor of the party entitled thereto.

CHAPTER V.

TRIAL BY THE COURT.

Section 680. When and how trial by jury may be waived.
" *681. Upon trial by court, decision to be in writing and filed within twenty days.*
" *682. Facts found and conclusions of law must be separately stated. Judgment on.*
" *683. Findings may be waived, how.*

Section 684. Want of findings—Judgment not reversed.
" 685. Exception for defective findings. Particular defect to be pointed out.
" 686. Exceptions to be filed and served on opposite party.
" 687. Trial upon agreed statement of facts.
" 688. Proceedings after determination of issue of law.

Sec. 680. Trial by the jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent, in open court, entered in the minutes.

Sec. 681. Upon a trial of a question of fact by the court, its decision or findings must be given in writing and filed with the clerk within twenty days after the case is submitted for decision.

Sec. 682. In giving the decision or making its findings, the facts found and the conclusions of law must be separately stated, and judgment must thereupon be entered accordingly.

Sec. 683. The findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial.
2. By consent in writing, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

Sec. 684. No judgment shall be reversed on appeal for want of findings at the instance of any party who, at the close of the evidence and argument in the cause, shall not have requested findings in writing and had such request entered in the minutes of the court; nor in cases tried by the court shall the judgment be reversed on appeal for defects in the findings unless exceptions be made in the court below for a defect in the findings or in a finding.

Sec. 685. In cases of exceptions for defective findings, the particular point or issue upon which the party requires a finding to be made, or the particular defect to be remedied, shall be specifically and particularly designated; and upon failure of the court to remedy the alleged defect, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge as in other cases.

Sec. 686. Such exceptions shall be filed in the court and served on the attorney of the adverse party within five days after receiving from or giving to the adverse party a written notice of the filing of the findings.

Sec. 687. When any cause is tried and submitted upon a written statement of facts agreed to by the parties or their attorneys, such statement shall have the effect of a special verdict or finding of facts, and judgment shall be pronounced thereon as upon a special verdict or finding of facts ; and in such case no finding of facts shall be made unless such statement shall fail to embrace all the facts proved and in issue, in which case any additional fact may be found upon evidence which is not repugnant to the agreed statement.

Sec. 688. On a judgment for the plaintiff upon an issue of law he may proceed in the manner prescribed by the first two subdivisions of Section 625, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided.

CHAPTER VI.

REFERENCE AND TRIAL BY REFEREES.

Section 692. Reference ordered upon agreement of parties, in what cases.
" *693. Reference ordered on motion, in what cases.*
" *694. Number of referees, etc.*
" *695. Oath of referee.*
" *696. Witnesses may be subpoenaed.*
" *697. Powers of referee on the trial.*
" *698. Proceedings regulated where there are several referees.*
" *699. Either party may object to referee. Grounds of objection.*
" *700. Objections, how disposed of.*
" *701. Referee must report findings in writing.*
" *702. Finding must stand as finding of court.*
" *703. Exceptions. Effect. Special verdict.*

Sec. 692. A reference may be ordered upon the agreement of the parties, filed with the clerk or entered in the minutes:

1. To try any or all of the issues in an action or proceeding, whether of fact or law, and to report a finding and judgment thereon.

2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

Sec. 693. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action.

4. When it is necessary for the information of the court in a special proceeding.

Sec. 694. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection.

Sec. 695. Every referee, before acting as such, shall take and subscribe an oath (or affirmation), before some authorized officer, which shall be filed with the clerk of the court by which he is appointed, that he will honestly, impartially, and faithfully perform the duties of referee in the action or matter referred to him, as required by law, to the best of his knowledge and ability.

Sec. 696. A witness may be subpoenaed to attend before a referee, to testify, and, in a proper case, to bring with him a book, document, or other paper, as upon a trial by the court.

Sec. 697. The trial by a refereee of an issue of fact, or of an issue of law, may be brought on for hearing upon notice of the referee and conducted in like manner, and the papers to be furnished thereupon are the same, and are furnished in like manner, as where the trial is by the court, without a jury. The referee exercises, upon such a trial, the same power as the court to grant adjournments, to preserve order, and punish the violation thereof. Upon the trial of an issue of fact, the referee exercises also the same power as the court, to allow amendments to tne summons or to the pleadings; to compel the attendance of witnesses by attachment; and to punish a witness for contempt of court, for non-attendance, or refusal to be sworn, or to testify. Upon the trial of an issue of law, the referee exercises the same power as the court, to permit a party in fault to plead anew or amend; to direct the action to be divided into two or more actions; to award costs and otherwise to dispose of any questions arising upon the decision of the issue referred to him. The powers, conferred by this section, are exercised in like manner and upon like terms, as similar powers are exercised by the court upon a trial.

Sec. 698. Where the reference is to more than one referee, all must meet together and hear all the allegations and proofs of the parties; but a majority may appoint a time and place for the trial, decide any question that arises upon the trial, sign a report or settle a case. Either of them may administer an oath to a witness; and a majority of those present, at a time and place appointed for the trial, may adjourn the trial to a future day.

Sec. 699. Either party may object to the appointment of any person as referee, on the same grounds that he might object to him as a trial juror, as provided in Section 650 of this Code.

Sec. 700. The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be read and witnesses examined as to such objection.

Sec. 701. The referees must report their findings in writing to the court within ten days after the testimony is closed, or such other time as the court may allow, and the facts found and the conclusions of law must be separately stated therein.

Sec. 702. The finding of the referee upon the issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered theron in the same manner as if the action had been tried by the court.

Sec. 703. The finding of the referee may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the findings reported have the effect of a special verdict.

CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

Article I. Exceptions.
" *II. New Trials.*

ARTICLE I.

EXCEPTIONS.

Section 706. Exceptions may be taken. Time when taken, etc.
" *707. What deemed excepted to.*
" *708. Exception, form of.*
" *709. Questions and answers in full may be given, when.*
" *710. Exceptions signed by a judge and filed with the clerk.*
" *711. Exceptions not presented at time of ruling. Notice to adverse party, how settled upon, etc.*
" *712. Exceptions after judgment, etc.*
" *713. When exception is refused, application to Supreme Court to prove the same, etc.*
" *714. Proceedings when judge ceases to hold office.*

Sec. 706. An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer in an action or proceeding. The exception must be taken at the time the decision is made, except as is provided in Section 707.

Sec. 707. The verdict of the jury, the instructions and charge of the court, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the right of the party or some of them ; an order or decision from which an appeal may be taken ; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance ; an order made upon an *ex parte* application, an order or decision made in the absence of the party, are deemed to have been excepted to and no bill of exceptions is required.

Sec. 708. No particular form of exception is required, but the grounds of the objection shall be particularly stated except as provided in the next preceding section, and when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence taken from the stenographer's notes, or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated or used as evidence. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto, sufficient to identify them, may be made when that will sufficiently present the objections and exceptions.

Sec. 709. If, in the opinion of the court or judge, the questions and answers in full as given at the trial are necessary to clearly present the objections, and the grounds thereof, the court or judge shall order the stenographer to make a complete transcript of his notes of the evidence and such notes shall be used in the bill of exceptions.

Sec. 710. A bill containing an exception to any decision may be presented to the court or judge for settlement, at the time the decision is made, and after having been settled, shall be signed by the judge and filed by the clerk, but this shall not delay the trial or hearing. When the decision excepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions shall be presented to, and settled and signed by such tribunal or officer.

Sec. 711. When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action was tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action was pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such service the adverse party may propose amendments thereto and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days notice to the adverse party, or be delivered to the clerk of the court, or judge. When received by the clerk he must immediately deliver them to the judge, if he be in the county; if he be absent from the county, and either party desire the papers to be forwarded to the judge, the clerk must, upon notice in writing of such parties, immediately forward them by mail, or other safe channel; if not thus forwarded, the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated the judge must settle the bill. If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to the adverse party, and thereupon the referee shall settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee, for settlement without notice to the adverse party. It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible. When setted, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.

Sec. 712. Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and be settled or noted, as provided in Section 710, and a bill thereof may be presented and settled afterward as provided in Section 711, and within like periods after entry of the order, upon appeal from which such decision is reviewable.

Sec. 713. If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same; the application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

Sec. 714. When the decision excepted to was made by any judicial officer other than a judge, the bill of exceptions shall be presented to such judicial officer, and be settled and signed by him, in the same manner as is required to be presented to, settled, and signed by a court or judge. A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the State, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the Supreme Court may by its order or rules direct. Judges, judicial officers, and the Supreme Court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions.

ARTICLE II.

NEW TRIALS.

Section *718. New trial defined.*
" *719. When a new trial may be granted.*
" *720. On what papers moved for.*
" *721. Notice of motion, upon whom served, and what to contain.*
" *722. Motion to be heard at the time specified, or dismissed.*
" *723. Stay of proceedings, when.*
" *724. Judge to make statement on decision of the motion. This statement to constitute bill of exceptions.*

Sec. 718. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees.

Sec. 719. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly-discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

5. Excessive damages, appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

Sec. 720. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon a bill of exceptions or a statement of the case, prepared as hereinafter provided.

Sec. 721. The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court, or referee, if the action was tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made.

1. If the motion is made upon affidavits the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, file such affidavits with the clerk and serve a copy upon the adverse party, who shall have ten days to file counter affidavits, a copy of which must be served upon the moving party.

2. If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions as is provided after entry of judgment, or after receiving notice of such entry by Section 711, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has already been settled and filed, when the notice of motion has been given, such bill shall be used on the motion.

3. If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending or the judge thereof may allow, prepare a draft of the statement and serve the same, or a copy thereof, upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto and serve the same, or a copy thereof, upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause for settlement, or to be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement

of the statement shall be taken by the parties and clerk and judge as are required for the settlement of bills of exception by Section 711. If the action was heard by a referee, the same proceedings shall be had for the settlement by him as are required by that section for the settlement of bills of exception by a referee. If no amendments are served within the time designated, or, if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee for settlement without notice to the adverse party. When the notice of the motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law, occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made the statement shall be disregarded on the hearing of the motion. It is the duty of the judge or referee in settling the statement to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled and the proposed statement and amendments properly engrossed, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk. Matters contained in any bill of exceptions shall not be repeated in a statement, and if so repeated shall be stricken therefrom by the judge or referee.

Sec. 722. The application for a new trial shall be heard at the earliest practicable period after notice of the motion, and after the affidavits, bill of exceptions, or statement, as the case may be, are filed; and may be brought to a hearing upon motion of either party. On such hearing reference may be had in all cases to the pleadings and orders of the court on file or of record.

Sec. 723. When notice of intention to move for a new trial is given, the judge may, upon such terms as in his opinion shall be just, make an order staying proceedings until the motion for new trial is disposed of.

Sec. 724. The judgment roll, and the affidavits, or bill of exceptions or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial.

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

Section 728. Judgment to be entered in twenty-four hours, etc.
" *729. Case may be brought before the court for argument.*
" *730. When counterclaim established exceeds plaintiff's demand.*
" *731. In replevin, judgment to be in the alternative, and with damages.*
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" *734. Judgment roll, what to constitute.*
" *735. Judgment lien, when it begins and when it expires.*
" *736. Docket, how kept, and what to contain.*
" *737. Docket to be open for inspection without charge.*
" *738. Transcript to be filed in any county, and judgment to become a lien there.*
" *739. Satisfaction of a judgment, how made.*

Sec. 728. When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

Sec. 729. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

Sec. 730. If a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Sec. 731. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or for the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

Sec. 732. The clerk must keep, with the records of the court, a book to be called the "judgment book," in which judgments must be entered.

Sec. 733. If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such a judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

Sec. 734. Immediately after entering the judgment the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum endorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment.

2. In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, all bills of exceptions taken and filed, all orders, matters, and proceedings deemed excepted to without bill of exceptions, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision.

Sec. 735. Immediately after filing the judgment roll, the clerk must make the proper entries of the judgment under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied.

Sec. 736. The docket mentioned in the last section is a book which the clerk keeps in his office, with each page divided into eight columns, and headed as follows: Judgment debtors, judgment creditors, judgment, time of entry, where entered in judgment book, appeals, when taken, judgment of appellate court, satisfaction of judgment, when entered. If judgment before the recovery of money or damages, the amount must be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted must be stated. The names of the defendants must be entered in alphabetical order.

Sec. 737. The docket kept by the clerk is open at all times during office hours, for the inspection of the public, without charge. The clerk must arrange the several dockets kept by him in such a manner as to facilitate their inspection.

Sec. 738. A transcript of the original docket, certified by the clerk, may be filed with the District Court clerk of any other county, and from the time of the filing the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for six years, unless the judgment be previously satisfied.

Sec. 739. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or by his indorsement on the face, or on the margin of the record of the judgment, or by his attorney, unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it.

TITLE IX.

EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

Chapter I. The Execution.
" II. Proceedings Supplemental to the Execution.

CHAPTER I.

THE EXECUTION.

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" 746. Execution when all defendants not served.
" 747. When made returnable.
" 748. Money judgments and others, how enforced.
" 749. Execution after six years.
" 750. Execution after death.
" 751. Execution, how and when issued.
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Section 768. *Real property sold, how redeemed, who are redemptioners.*
" 769. *Redemption money.*
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" 771. *To whom payment may be made.*
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Sec. 744. The party in whose favor judgment is given, may, at any time within six years after the entry thereof, have a writ of execution issued for its enforcement.

Sec. 745. The writ of execution must be issued in the name of the State of Montana, sealed with the seal of the court, and subscribed by the clerk, and must be directed to the sheriff, and must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and shall require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment with interest, out of the personal property of such debtor; and if sufficient personal property cannot be found, then out of his real property; or if the judgment be lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or, if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the clerk of the District Court of such county, stating such day or any time thereafter.

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

3. If it be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at any time require the sheriff to satisfy any costs, damages, rents or profits recovered by the same judgment out of the personal property of the person against whom it was rendered, and the value of the property

for which the judgment was rendered, to be specified therein; if a delivery cannot be had and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

Sec. 746. When a writ of execution is issued on a judgment recovered against two or more persons in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it must direct the sheriff to satisfy the judgment out of the joint property of all the defendants and the individual property only of the defendants who were served or who appeared in the action.

Sec. 747. The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "execution book," which must be indexed with the names of the plaintiffs and defendants in execution, alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed or mutilated.

Sec. 748. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or in part. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith. When the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

Sec. 749. In all cases the judgment may be enforced or carried into execution after the lapse of six years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings.

Sec. 750. Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:

1. In case of the death of the judgment creditor, upon the application of his executor, or administrator, or successor in interest.

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon, execution may be issued with the same effect as if he were still living.

Sec. 751. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the State. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties.

Sec. 752. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

Sec. 753. If execution is levied upon the interest of one or more parties in the goods and property of a partnership, the same proceedings shall be had as in attachments as provided in Sections 693 and 694 of this Code. Personal property mortgaged or pledged may be taken on execution as provided in Section 2449 of the Civil Code.

Sec. 754. If personal property levied upon be claimed by a third person, the same proceedings shall be had as provided in attachment in Section 558 of this Code.

Sec. 755. The following property is exempt from execution, except as herein otherwise provided:

In all cases all wearing apparel of the judgment debtor and family; also all chairs, tables, desks and books to the value of two hundred dollars; and also all necessary household, table and kitchen furniture of the judgment debtor, including one sewing machine, stoves, stovepipes and stove furniture, heating apparatus, beds, bedding and bedsteads, and provisions and fuel provided for individual or family use sufficient for three months, and also one horse, saddle and bridle, two cows with their calves, four hogs and fifty domestic fowls, and feed for such animals for three months, one clock and all family pictures.

Sec. 756. In addition to the property mentioned in the preceding section, there shall be exempt the following property:

1. To a farmer: Farming utensils or implements of husbandry, not exceeding in value six hundred dollars; also, two

oxen, or two horses or mules, and their harness, one cart or wagon, and food for such oxen, horses, cows or mules, for three months; also, all seed, grain or vegetables, actually provided, reserved, or on hand, for the purpose of planting or sowing at any time within six months, not exceeding in value the sum of two hundred dollars.

2. To a mechanic or artizan: Tools or implements necessary to carry on his trade.

3. To a surgeon, physician or dentist: The instruments and chest necessary to the exercise of his profession, with his scientific and professional libraries, and necessary office furniture.

4. To attorneys at law and ministers of the gospel, etc.: The professional libraries of attorneys, counselors and judges, and ministers of the gospel, editors, school teachers and music teachers, and their necessary office furniture; also the musical instruments of music teachers; also the notarial seal, records and office furniture of a notary public.

5. To a miner: His cabin or dwelling, sluices and pipes, hose, windlass, derricks, cars, pumps, tools, implements and appliances necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of one thousand dollars, and one horse or mule, with harness, and food for such horse or mule, for three months, when such horse or mule is used in working his mine or mining claim.

6. To a cartman, hackman, huckster, peddler, teamster, or laborer: One horse or mule, and harness for two animals or two oxen, and harness, and one cart or wagon, one dray or truck, one hack or carriage, by the use of which such person habitually earns his living; and one vehicle and harness or other equipments used by a physician or surgeon or minister of the gospel in making his professional visits, with food for such horse, mule, or oxen for three months.

7. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this State, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessaries of life; the one-half of such earnings above mentioned are, nevertheless, subject to execution, garnishment, or attachment to satisfy debts so incurred. The words "his family," as used herein, are to be construed with the words "head of a family" used in Section 1060 of the Civil Code.

8. All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed five hundred dollars.

9. All fire engines, hooks and ladders, with the cart,

trucks, and carriages, hose, buckets, implements, and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this State.

10. All arms, uniforms, and accoutrements required by law to be kept by any person, and also one gun, to be selected by the debtor.

11. All court houses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the court house, jail and public offices belonging to any county of this State, and all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company organized under the laws of this State.

No article, however, or species of property mentioned in this section, is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this State shall have the benefit of these exemptions.

No person can claim more than one of the exemptions mentioned in the first six subdivisions of this section.

Sec. 757. The homestead of a judgment debtor exempt from execution, is provided for in the Civil Code in Sections 1036 to 1063, inclusive.

Sec. 758. The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs, must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs.

Sec. 759. Before the sale of the property on execution, notice thereof must be given as follows:

1. In case of perishable property: By posting written notice of the time and place of the sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property: By posting a similar notice in three public places in the township or city where the sale is to take place, for not less than five days nor more than ten days.

3. In case of real property: By posting a similar notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, which may be either at the court house or on the premises, and publishing a copy thereof once a week for the same period, in some newspaper published in the county, if there be one; which notice shall be substantially as follows:

SHERIFF'S SALE.

————————, Plaintiff, }
vs.
————————, Defendant, }

To be sold at sheriff's sale on the ——— day of ———, 18—, at ———. (Here insert brief description of property.)

Signed. ——————, Sheriff.

Any sheriff publishing a notice not in accordance with this form, and which shall cost more than such a notice, shall not be entitled to any costs for the publication of the same, but shall be personally liable for the payment of such publication.

Sec. 760. An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars.

Sec. 761. All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or, when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

Sec. 762. If a purchaser refuse to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction, and the person refusing to pay the costs which have accrued by reason of his bid, shall be deemed guilty of contempt of court and punished accordingly.

Sec. 763. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such purchaser.

Sec. 764. The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

Sec. 765. When the purchaser of any personal property, capable of manual delivery, pays the purchase money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

Sec. 766. When the purchaser of any real property, not capable of manual delivery, pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

Sec. 767. Upon a sale of real property, the purchaser is substituted to and acquires the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years unexpired term, the sale is absolute. In all other cases the property is subject to redemption, as provided in this Chapter. The officer must give to the purchaser a certificate of sale, containing:

1. A particular description of the property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption it must be so stated.

A duplicate of such certificate must be filed by the officer in the office of the county clerk.

Sec. 768. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property.
2. A creditor having a lien by a judgment, mortgage or attachment, on the property sold, or on some share or part

thereof, subsequent to that on which the property is sold. If a corporation be such creditor, any stockholder thereof may redeem, in case the officers of such corporation refuse so to do. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

Sec. 769. The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within six months after the sale, on paying the purchaser the amount of his purchase, with two per cent. per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien, with interest.

Sec. 770. If property be so redeemed by a redemptioner another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent. thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as the redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent. thereon in addition, and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the sheriff, and a duplicate filed with the county clerk, and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any liens other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff, and filed with the county clerk, and if such notice be not filed, the property may be redeemed without paying such tax assessments or lien. If no redemption be made within six months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of six months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by a debtor, the person to whom the payment was made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the county clerk of the county in which the property is situated, and the county clerk must note the record thereof in the margin of the record of the certificate of sale.

Sec. 771. The payment mentioned in the last two sections may be made to the purchaser or redemptioner, as the case may be, or for him, to the officer who made the sale, or, in case his term of office has expired, then to his successor in office, and in all cases when, under the provisions of this chapter, a purchaser of property at execution sale shall be entitled to a conveyance of the same, such conveyance shall be executed to him by the officer who made the sale, if he still be in office, but in the case the officer who made such sale is not in office at the time the purchaser may be entitled to such conveyance, then the conveyance shall be executed by his successor in office.

Sec. 772. A redemptioner must produce to the officer or person, from whom he seeks to redeem, and serve with his notice to the sheriff.

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the clerk of the District Court in the county where the judgment is docketed, or if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the county clerk. If upon an attachment, a copy of the affidavit of attachment, certified by the clerk of the District Court.

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto.

3. An affidavit by himself or his agent, showing the amount then actually due upon the lien.

Sec. 773. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterward during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repair of fences, or for fuel for his family, while he occupies the property.

Sec. 774. The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amount of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amount of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

Sec. 775. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom, in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid with interest from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession, in consequence of irregularity in the proceeding concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest, or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and, when so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid; and any other or after acquired property, rents, issues, or profits of the said debtor shall be liable to levy and sale under execution, in satisfaction of such debt, but no property of such debtor, sold *bona fide* before the filing of such petition, shall be subject to the lien of said judgment. The notice of the filing of such petition shall be made by filing a notice thereof in the office of the county clerk where such property may be situated, and that said judgment shall be revived in the name of the original plaintiff or plaintiffs for the use of said petitioner, the party in interest.

Sec. 776. When property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several and is upon an obligation of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where judgment was rendered, notice of his payment and claim to contribution or repayment. Upon the filing of such notice, the clerk must make an entry thereof in the margin of the docket.

Sec. 777. The provisions of Section 577, of this Code, relating to the garnishment of public officers, apply to the levy of an execution.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

Section 780. Debtor required to answer concerning his property, when.
" *781. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given.*
" *782. Any debtor of the judgment debtor may pay the latter's creditor.*
" *783. Examination of debtors of judgment debtor, or of those having property belonging to him.*
" *784. Witnesses required to testify.*
" *785. Judge may order property to be applied on execution.*
" *786. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.*
" *787. Disobedience of orders, how punished.*
" *788. No person excused from answering on the ground of fraud.*
" *789. When and how a receiver may be appointed.*
" *790. Oath and undertaking.*
" *791. When property vests in receiver.*
" *792. Title by relation.*

Sec. 780. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in this State, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied in whole or in part, the judgment creditor at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides.

Sec. 781. After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment, as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent, or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison.

Sec. 782. After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is sufficient discharge for the amount so paid.

Sec. 783. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

Sec. 784. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this Chapter, in the same manner as upon the trial of an issue.

Sec. 785. The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment.

Sec. 786. If it appear that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

Sec. 787. If any person, party or witness disobey an order of the referee, properly made, in the proceedings before him under this Chapter, he may be punished by the court or judge ordering the reference for a contempt.

Sec. 788. A party or witness examined in proceedings authorized by this Chapter is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud, or to prove that he has been a party or privy to, or knowing of, a conveyance, assignment, transfer, or other disposition of property for any purpose; or that he or any other person claims to be entitled, as against the judgment creditor, or a receiver appointed or to be appointed in the proceedings, to hold property derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor, or to a person in his behalf. But an answer can not be used as evidence against the person so answering in a criminal action or criminal proceeding.

Sec. 789. At any time after making an order requiring the judgment debtor or any other person to attend and be examined, as prescribed in this Chapter, the judge may make an order appointing a receiver of the property of the judgment debtor. At least two days' notice of the application for the order appointing a receiver, must be given personally to the judgment debtor, unless the judge is satisfied that he cannot, with reasonable diligence, be found within the State; in which case, the order must recite that fact, and may dispense with notice, or may direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined, has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him.

Sec. 790. An order appointing a receiver must be filed in the office of the clerk of the court where the judgment roll is filed, or a transcript of the judgment, and the receiver must take and subscribe the official oath, and give an undertaking, if required by the judge

Sec. 791. The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him, subject to the following exceptions:

1. Real property is vested in the receiver, only from the time when the order is filed with the clerk of the court, or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

2. Where the judgment debtor, at the time when the order is filed, resides in another county of the State, his personal property is vested in the receiver, only from the time when a copy of the order, certified by the clerk in whose office it is filed, is filed with the clerk of the District Court of the county where he resides.

Sec. 792. Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back, by relation, for the benefit of the judgment creditor in whose behalf the proceedings were instituted, as follows:

1. Where an order requiring the judgment debtor to attend and be examined has been served, before the appointment of a receiver, or the judgment debtor has been brought before the judge on arrest, the receiver's title extends back, so as to include the personal property of the judgment debtor, at the time of the service of the order or his arrest.

2. Where an order has not been served, or no arrest, as specified in the foregoing subdivision, but an order has been made, requiring a person to attend and be examined, concerning property belonging or a debt due, to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor, which was in the hands, or under the control, of the person or corporation thus required to attend, at the time of the service of the order; and to a debt then due him from that person or corporation.

3. In every other case, where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor, at the time when the notice was served, either personally, or by complying with the requirements of an order, prescribing a substitute for personal service.

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted.

But this section does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration; or the payment of a debt in good faith, and without notice.

TITLE X.

ACTIONS IN PARTICULAR CASES.

Chapter I. Actions for the foreclosures of mortgages.
" II. Actions for nuisance, waste and willful waste, in certain cases, on real property.
" III. Actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate.
" IV. Actions for the partition of real property.
" V. Quo warranto.
" VI. Actions against boats.

CHAPTER I.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

Section 800. Proceedings in foreclosure suits.
" 801. Surplus money to be deposited in court.
" 802. Proceedings when debt secured falls due at different times.
" 803. Power of sale.

Sec. 800. There is but one action for the recovery of debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this Chapter. In such action the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remain due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

Sec. 801. If there be surplus money remaining after payment of the amount due on the mortgage, lien or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

Sec. 802. If the debt for which the mortgage, lien or incumbrance is held is not all due, as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterward, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

Sec. 803. When a mortgage confers a power of sale, either upon the mortgagee or any other person, to be executed after a breach of the obligation for which the mortgage is a security, either an action may be maintained under this Chapter to foreclose, or proceedings may be had under provisions of the mortgage.

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE, AND WILLFUL TRESPASS IN CERTAIN CASES ON REAL PROPERTY.

Section 806. Nuisance defined and actions for.
" *807. Waste, actions for.*
" *808. Trespass for cutting or carrying off trees, etc., actions for.*
" *809. Measure of damages in certain cases under the last section.*
" *810. Damages in actions for forcible entry, etc., may be trebled.*

Sec. 806. Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so far as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Sec. 807. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

Sec. 808. Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner-of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

Sec. 809. Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland, for the repair of a public highway or bridge upon the land or adjoining it.

Sec. 810. If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building or cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

Section 813. Parties to an action to quiet title.
" *814. When plaintiff cannot recover costs.*
" *815. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.*
" *816. When value of improvements may be allowed as set-off.*
" *817. An order may be made to allow a party to survey and measure the land in dispute.*
" *818. Order, what to contain and how served. If unnecessary injury done, the party surveying to be liable therefor.*
" *819. Same.*
" *820. A mortgage must not be deemed a conveyance, whatever its terms.*
" *821. When court may grant injunction; during foreclosure, after sale on execution, before conveyance.*
" *822. Damages may be recovered for injury to the possession after sale and before delivery of possession.*
" *823. Action not to be prejudiced by alienation pending suit.*
" *824. Mining claims, actions concerning to be governed by local rules.*
" *825. Adverse claims under Acts of Congress.*

Sec. 813. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

Sec. 814. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs. But in actions which the plaintiff has brought under Section 2326 of the Revised Statutes of the United States to determine an adverse claim, the plaintiff shall recover costs if the defendant does not relinquish in the proper United States land office or disclaim in writing any interest or estate in the property within twenty days from the filing of said adverse claim in such land office.

Sec. 815. In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

Sec. 816. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damage.

Sec. 817. The court in which an action is pending for the recovery of real property or mining claims, or for damages for an injury, or to quiet title or to determine adverse claims thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter into or upon the property or mining claim and make survey or measurement thereof, or of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands or mining claims belonging to parties to the action.

Sec. 818. The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter the property, with necessary surveyors and assistants, and make such survey and measurement; but if unnecessary damage be done to the property, he is liable therefor.

Sec. 819. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. When the mortgage confers a power of sale, as mentioned in Section 2412, of the Civil Code, possession may be recovered according to the terms of the mortgage.

Sec. 820. Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such lead, mine, lode, or mining claim should be had or made; or whenever any inspection, examination, or survey of any such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lode or mining claim, and the person in possession of the same shall refuse, for a period of three days after demand therefor in writing, to allow such inspection, examination, or survey to be had or made, the party so desiring the same may present to the District Court, or a judge thereof, of the county wherein the mine, lead, lode, or mining claim is situated, a petition, under oath, setting out his interest in the premises, describing the same, that the premises are in the possession of a party, naming him, the reason why such examination, inspection, or survey is necessary, the demand made on the person in possession so to permit such examination, inspection, or survey, and his refusal so to do. The court or judge shall thereupon appoint a time and place for hearing such petition, and shall order notice thereof to be served upon the adverse party, which notice shall be served at least one day before the day of hearing. On the hearing either party may read affidavits or produce oral testimony, and if the court or judge is satisfied that the facts stated in the petition are true, he shall make an order for an inspection, examination, or survey of the lode or mining claim in question in such manner, at such time, and by such persons as are mentioned in the order. Such person shall thereupon have free access to such mine, lead, lode, or mining claim for the purpose of making such inspection, examination, or survey, and any interference with such person while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order, the costs of obtaining the order shall abide the result of the action, but all costs of making such examination or survey shall be paid by the petitioner.

Sec. 821. The court or judge, may by injunction, upon good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance.

Sec. 822. When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.

Sec. 823. An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

Sec. 824. In actions respecting mining claims, proof must be admitted of the customs, usages, or regulation established and in force at the bar or diggings embracing such claim, and such customs, usages or regulations, when not in conflict with the laws of this State or the United States, must govern the decision of the action.

Sec. 825. In an action brought to determine the respective rights of claimants to the possession of a mining claim or quartz lode, under the provisions of the Acts of Congress of the United States, it is immaterial which party is in possession, and it is sufficient to confer jurisdiction upon the court, if it appears from the pleadings that the application for a patent has been made and an adverse claim thereto filed and allowed in the proper land office; and the verdict or decision must find which party is entitled to the possession of the premises in dispute.

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

Section 830. Who may bring actions for partition.
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" *833. Who may be parties.*
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" *850. Referees must make report.*
" *851. Judgment, and on whom conclusive.*
" *852. Judgment does not affect tenant for years.*
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" *858. Proceeds of sale, and disposition.*
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“ *885. One referee may be appointed.*
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“ *887. Abstract, when cost of allowed.*
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Sec. 830. When several co-tenants hold and are in possession of real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners.

Sec. 831. An action for the partition of real property shall not be brought by an infant, except by the written authority of the district judge of the county in which the property, or a part thereof, is situated. The authority shall not be given unless the district judge is satisfied, by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing the action. A judgment for a partition shall not be rendered in such an action unless the court is satisfied that the interests of the infant will be promoted thereby, and that fact is expressly recited in the judgment. A guardian ad litem for an infant party, in an action for partition, can be appointed only by the court or judge, and must give an undertaking in a sum fixed by the judge for the faithful discharge of his trust, which undertaking must be approved by the judge and filed with the clerk.

Sec. 832. Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, or for years; every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of a particular estate therein; every person who, by any contingency, contained in a devise, or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof; every person having an inchoate right of dower in an undivided share in the property; and every person having a right of dower in the property, or any part thereof, which has not been admeasured, must be a party to an action for partition. But no person, other than a joint tenant or a tenant in common of the property, shall be a plaintiff in the action.

Sec. 833. The plaintiff may, at his election, make a tenant in dower, for life, or for years, of the entire property, or a creditor or other person, having a lien or interest, which attaches to the entire property, a defendant in the action. In that case the final judgment may either award to such a party his or her entire right and interest, or the proceeds thereof, or may reserve and leave unaffected his or her right or interest, or any portion thereof. A person specified in this section who is not made a party, is not affected by the judgment in the action.

Sec. 834. The interests of all the persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon the executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

Sec. 835. No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record.

Sec. 836. Immediately after filing the complaint in the District Court, the plaintiff must file in the office of the county clerk of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice, all persons shall be deemed to have notice of the pendency of the action.

Sec. 837. The summons must be directed to all the joint tenants and tenants in common, and all persons having an interest in, or any liens of record by mortgage, judgment or otherwise, upon the property, or upon any particular portion thereof, and generally to all persons unknown who have or claim any interest in the property.

Sec. 838. If a party having a share or interest is unknown, or any one of the known parties reside out of the State, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a general statement of the nature of the action and a brief description of the property which is the subject of the action.

Sec. 839. The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature and extent of their respective interests in the property; and if such defendant claim a lien on the property by mortgage, judgment or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also whether the same has been secured in any other way or not; and if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

Sec. 840. The right of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action. The title or interest ot the plaintiff in the property, as stated in the complaint, may be controverted by the answer. The title or interest of any defendant in the property, as stated in the complaint, may also be controverted by his answer, or the answer of any other defendant; and the title or interest of any defendant, as stated in his answer, may be controverted by the answer of any other defendant, and the issues joined as prescribed in Title VI., of this Code, which may be tried before a jury if the court so direct.

Sec. 841. When a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the summons has been made by publication, like proof must be required of the right of the absent or unknown parties, before such judgment is rendered; except where there are several unknown parties having an interest in the property, their rights may be considered together in the action, and not as between themselves.

Sec. 842. Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

Sec. 843. If it appears to the court, by the certificate of the clerk of the court and county clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaininig due thereon has been secured in any manner, and if secured, the nature and extent of the security.

Sec. 844. The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed, as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due or to become due contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

Sec. 845. If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint to the satisfaction of the court, that the property or any part is so situated that the partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained.

Sec. 846. When the site of an incorporate city or town is included within the exterior boundaries of the property to be partitioned, on said fact being established by evidence, the following proceedings shall be had: The court shall thereupon direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads and streets, as in Section 848, of this Code, provided, and to report such survey and separate appraisement on each lot and subdivision to the court. The court may confirm, change, modify, or set aside the report in whole or in part, and if necessary appoint new referees. When, after the final confirmation of the report of such survey and appraisement, it shall appear by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable, and a sale of the site of such city, town, or any portion thereof, will be for the best interests of the owners of the whole property, it shall order a sale thereof; *Provided*, That within sixty days thereafter any tenant in common, or tenants in common, having improvements erected on any town or city lot or subdivision included in such order of sale, shall have the prior right to purchase the same at such appraised valuation, and pay into court the amount so appraised as the value thereof, and upon such payment the title shall vest in such purchaser or purchasers, and the court shall cause to be executed by said referees a deed for such lot or subdivision in fee and in severalty to such purchaser or purchasers; such further proceedings shall then be had as to the remainder of the property, and the money so paid to the court, as by this Chapter provided.

Sec. 847. If, during the pendency of the action, any of the parties die or become insane or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court shall appoint an attorney to represent the interest which was held by such party, until his heirs or legal representatives, or successors in interest, shall have appeared in the action; and an attorney so appointed shall be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney, and may be adjudged a lien thereon, in the discretion of the court.

Sec. 848. In making partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this Chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. Before making partition or sale the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road or street, and the portion so set apart shall not be assigned to any of the parties or sold, but shall remain an open and public way, road or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land, roads sufficient in the judgment of said referees to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways.

Sec. 849. Whenever it shall appear, in an action for the partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned; has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance; *Provided*, that in all cases the court shall direct the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each co-tenant, so as to embrace as far as practicable the improvements made by such co-tenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land.

Sec. 850. The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share.

Sec. 851. The court may confirm, change, modify or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the

property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication.

3. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives or assigns of such decedent, as if it had been entered before his death.

Sec. 852. The judgment does not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.

Sec. 853. The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.

Sec. 854. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must be first charged, with its just proportion of the costs of the partition, in preference to such lien.

Sec. 855. When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

Sec. 856. The proceeds of the sale of incumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action.

2. To pay the costs of the reference.

3. To satisfy and cancel of record the several liens in their order priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.

4. The residue among the owners of the property sold, according to their respective shares therein.

Sec. 857. Whenever any party to an action, who holds a lien upon the property or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof.

Sec. 858. The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into the court, or deposited therein, or as directed by the court.

Sec. 859. When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action and who are known, are paid into the court, the action may continue as between such parties for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy by pleadings, as in an original action.

Sec. 860. All sales of real property, made by referees under this Chapter, must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge or lien, that must be stated in the notice.

Sec. 861. The court must, in the order of sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the State.

Sec. 862. The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for the other shares, in the name of the clerk of the court of the county and his successors in office.

Sec. 863. The person entitled to a tenancy for life, or years, or who has a right or inchoate right of dower, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

Sec. 864. If such consent be not given, filed and entered, as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in court for him or her as the case may require.

Sec. 865. If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

Sec. 866. In all cases of sales, when it appears that any person has a vested or contingent or future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured or paid over, in such manner as to protect the rights and interests of the parties.

Sec. 867. In all cases of sales of property the terms must be made known at the time, and if the premises consist of distinct farms and lots, they must be sold separately.

Sec. 868. Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

Sec. 869. After completing a sale of the property, or any part thereof ordered to be sold, the referee must report the same to the court, with a description of the different parcels of land sold to each purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the court and a certified copy thereof in the office of the county clerk of the county where the property is situated.

Sec. 870. If the sale be confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

Sec. 871. When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

Sec. 872. The conveyance must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

Sec. 873. Where there are proceeds of a sale belonging to an unknown owner, or to a person without the State, who has no legal representative within it, the same must be invested in bonds of this State or the United States, for the benefit of the persons entitled thereto.

Sec. 874. When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the court where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the persons interested, subject to the order of the court.

Sec. 875. When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of, and payable to, the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk of the court.

Sec. 876. The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Sec. 877. When it appears that a partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases, the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

Sec. 878. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale, to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

Sec. 879. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking approved by a judge of the court, that he will faithfully discharge the trust imposed in him, and will render a true and just account to the person entitled, or to his legal representative.

Sec. 880. The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release, in his behalf, to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the court.

Sec. 881. Where a party has an existing right of dower in the entire property directed to be sold, at the time when a judgment of partition is rendered, the court must consider and determine whether the interests of all the parties require that the right of dower should be excepted from the sale, or that it should be sold.

Sec. 882. If a sale of the property, including the right of dower, is directed, the interest of the party entitled to the right of dower shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right. In that case the dowress is entitled to receive from the proceeds of the sale of the whole property a gross sum in satisfaction of her right of dower, or to have one-third of those proceeds paid into court for the purpose of being invested for her benefit.

Sec. 883. A married woman may release to her husband or a purchaser her inchoate right of dower in the property directed to be sold by a written instrument, duly acknowledged by her and certified as required by law with respect to the acknowledgment of a grant by a married woman.

Sec. 884. The costs of partition, including reasonable counsel fees expended by the plaintiff or either of the defendants for the common benefit, fees of referees or other disbursements, must be paid by the parties respectively entitled to share in the lands divided in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced, by execution, against such shares and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

Sec. 885. The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this Chapter; and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees.

Sec. 886. If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common for the protection, confirmation, or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action who have paid the expense of such litigation or other proceedings, all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said expenditures, and the same must be pleaded and allowed by the court and included in the final judgment, and shall be a lien upon the share of each tenant, respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected.

Sec. 887. If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterward made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed. Whenever such abstract is procured by the plaintiff, before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same and where it will be kept when finished. The court or judge thereof may direct, from time to time during the progress of the action, who shall have the custody of the abstract.

Sec. 888. The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the county clerk or other officer, but instead thereof it must be verified by the affidavit of the person making it to the effect that he believes it to be correct; but the same may be corrected, from time to time, if found incorrect, under the direction of the court.

Sec. 889. Whenever, during the progress of the action for partition, any disbursements shall have been made under the direction of the court or the judge thereof by a party thereto, interest must be allowed thereon from the time of making such disbursements.

CHAPTER V.

QUO WARRANTO.

Section 895. When proceedings may be instituted.
" *896. When against a corporation.*
" *897. Who may commence the action.*
" *898. Upon whose relation.*
" *899. When private person may commence action.*
" *900. What complaint to contain.*
" *901. Who made defendants.*
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" *903. Application to file complaint, etc.*
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" *905. Service by publication.*
" *906. Pleadings.*
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" *909. When court may order new election.*
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" *911. Action for damages.*
" *912. Judgment, how enforced.*
" *913. When corporation has forfeited its rights.*
" *914. Appointment of trustees, etc.*
" *915. Powers and duties of trustees.*
" *916. How trustees placed in possession.*
" *917. Attachment for costs.*
" *918. Actions have precedence.*
" *919. Actions in Supreme Court.*
" *920. Effect of appeal.*

Sec. 895. A civil action may be brought in the name of the State:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this State, or an office in a corporation created by the authority of this State.

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office.

3. Against an association of persons who act as a corporation within this State without being legally incorporated.

Sec. 896. A like action may be brought against a corporation:

1. When it has offended against a provision of an act for its creation, or renewal, or any act altering or amending such acts.

2. When it has forfeited its privileges and franchises by non-user.

3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges, and franchises.

4. When it has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred.

Sec. 897. The Attorney General, when directed by the Governor, shall commence any such action; and when, upon complaint or otherwise, he has good reason to believe that any case specified in the preceding section can be established by proof, he shall commence an action.

Sec. 898. Such officer may, upon his own relation, bring any such action, or he may, on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under the first subdivision of Section 895, he may require security for costs, to be given as in other cases.

Sec. 899. A person claiming to be entitled to a public office unlawfully held and exercised by another, by himself or by an attorney and counselor at law, may bring an action therefor in the name of the State, as provided in this Chapter. On filing the complaint, such person shall enter into an undertaking with two sufficient sureties, to be approved by the judge or any judge of the court in which the action is brought, conditioned that such persons will pay any judgment for costs or damages recovered against him, and all costs and expenses incurred in the prosecution of the action, which undertaking shall be filed with the clerk of the court.

Sec. 900. When the action is against a person for usurping an office, the complaint shall set forth the name of the person who claims to be entitled thereto, with an averment of his right thereto, and judgment may be rendered upon the right of the defendant, and also upon the right of the person so averred to be entitled, or only upon the right of the defendant, as justice requires.

Sec. 901. All persons who claim to be entitled to the same office or franchise may be made defendants in the same action to try their respective rights to such office or franchise.

Sec. 902. An action under this Chapter can be brought in the Supreme Court of the State, or in the District Court of the county in which the defendant, or one of the defendants, resides or is found, or, when the defendant is a corporation, in the county in which it is situate, or has a place of business.

Sec. 903. Upon application for leave to file a complaint, the court or judge may direct notice thereof to be given to the defendant previous to granting such leave and may hear the defendant in opposition thereto, and if leave be granted, an entry thereof shall be made on the minutes of the court, or the fact shall be indorsed by the judge on the complaint, which shall then be filed.

Sec. 904. When the complaint is filed without leave and notice, a summons shall issue, and be served as in other cases.

Sec. 905. When a summons is returned not served because the defendant, or its officers or office, canot be found within the county, the clerk shall publish the summons as in other cases.

Sec. 906. The pleadings shall be as in other cases.

Sec. 907. When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising, an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs.

Sec. 908. When the action is against a director of a corporation, and the court finds that, at his election, either illegal votes were received, or legal votes were rejected, or both, sufficient to change the result, judgment may be rendered that the defendant be ousted, and of induction in favor of the person who was entitled to be declared elected at such election.

Sec. 909. In a case named in the last section the court may order a new election to be held, at a time and place, and by judges, appointed by the court, notice of which election, and naming the judges, shall be given for the time and in the manner provided by law for notice of elections of directors of such corporation; the order of the court shall become obligatory upon the corporation and its officers when a duly certified copy thereof is served upon its secretary personally, or left at its principal office; and the court may enforce its order by attachment, or in any other manner it deems necessary.

Sec. 910. If judgment be rendered in favor of the person averred to be entitled to an office, he may, after taking the oath of office, and executing any official bond required by law, take upon him the execution of the office; and he shall immediately thereafter demand of the defendant all the books and papers in his custody or within his power appertaining to the office from which he has been ousted.

Sec. 911. Such person may, at any time within one year after the date of such judgment, bring an action against the party ousted, and recover the damages he sustained by reason of such usurption.

Sec. 912. If such defendant refuse or neglect to deliver over any such book or paper pursuant to such demand, he shall be deemed guilty of a contempt of court, and shall be fined in any sum not exceeding ten thousand dollars, and imprisoned in the jail of the county until he complies with the order of the court, or is otherwise discharged by due course of law.

Sec. 913. When, in any such action, it is found and adjudged that a corporation has, by an act done or omitted, surrendered or forfeited its corporate rights, privileges, or franchises, or has not used the same during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved; and when it is found and adjudged that a corporation has offended in any matter or manner which does not work such surrender or forfeiture, or has misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offence, or the exercise of such power.

Sec. 914. The court rendering a judgment dissolving a corporation shall appoint trustees of the creditors and stockholders of the corporation, who, after giving an undertaking, payable to the State, in such sum and with such sureties as the court may designate and approve, conditioned that they will faithfully discharge their trust, and properly pay and apply all money that may come into their hands, shall have power to settle the affairs of the corporation, collect and pay outstanding debts, and divide among the stockholders the money and other property which remain after the payment of debts and necessary expenses.

Sec. 915. The trustees shall forthwith demand all money, property, books, deeds, notes, bills, obligations and papers of every description, within the custody, power or control of the officers of the corporation, or either of them belonging to the corporation, or in anywise necessary for the settlement of its affairs, or for the discharge of its debts and liabilities, and they may sue for and recover the demands and property of the corporation, and shall be jointly and severally liable to the creditors and stockholders to the extent of its property and effects which come into their hands.

Sec. 916. An officer of such corporation who refuses or neglects to deliver over any such money, or other things, pursuant to such demand, shall be deemed guilty of a contempt of court, and shall be fined not exceeding ten thousand dollars, and imprisoned in the jail of the proper county until he complies with the order of the court, or is otherwise discharged by due course of law; and he shall be liable to the trustees for the value of all money, or other things, so refused or neglected to be surrendered, together with all damages that have been sustained by the stockholders and creditors of the corporation, or any of them, in consequence of such neglect or refusal.

Sec. 917. If judgment be rendered against a corporation, or against a person claiming to be a corporation, the court may render judgment for costs against the directors or other officers of the corporation, or against the person claiming to be a corporation.

Sec. 918. Actions under this Chapter in any court shall have precedence of any civil business pending therein; and the court, if the matter is of public concern shall, on the motion of the Attorney General, or the attorney of the party, require as speedy a trial of the merits of the case as may be consistent with the rights of the parties.

Sec. 919. Actions under this Chapter, commenced in the Supreme Court, shall be conducted in the same manner as if commenced in the District Court, and the clerk of the Supreme Court shall have the same authority to issue summons and other process and to enter orders and judgments as the clerk of the District Court has in like cases. All pleadings and the conduct of the trial shall be the same as in the District Court. If a jury is required to determine an issue of fact, a jury shall be drawn and selected from the jury boxes of the county in which the seat of government is located, and the clerk of the District Court of said county must place such jury boxes in the custody of the clerk of the Supreme Court for that purpose.

Sec. 920. If the action is commenced in the District Court, an appeal may be taken from the judgment by either party to the Supreme Court as in other cases, but if there is judgment of ouster against the defendant, there shall be no stay of execution or proceedings pending such appeal.

CHAPTER VI.

ACTIONS AGAINST BOATS.

Section *925. For what boats may be attached.*
" *926. Claims that are liens upon boats.*
" *927. Priority of liens.*
" *928. Limitation of actions against boats.*
" *929. When lien to attach.*
" *930. Liability of rafts; proceedings same as against boats.*
" *931. Proceedings, how commenced.*
" *932. Description of boat.*
" *933. Summons, how served.*
" *934. Who may serve summons.*
" *935. Who may appear for defendant, no continuance granted plaintiff.*
" *936. Boat may be discharged before judgment, by giving bond.*
" *937. Execution against boat.*
" *938. What officer may sell to satisfy execution.*
" *939. Status of purchaser of fractional interest.*

Section 940. Plaintiff's right to otherwise sue not affected.
" *941. Sufficient allegation that services were rendered boat.*

Sec. 925. Any boat found within the waters of this State is liable:

1. For all debts contracted by the master, owner, agent, clerk, or consignee thereof, on account of supplies furnished for the use of such boat, or on account of work done or materials furnished in building, repairing, fitting out, furnishing, or equipping such boat.

2. For all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment, or any contract relative to the transportation of persons or property, entered into by the master, owner, agent, clerk, or consignee thereof.

3. For all injuries to persons or property by such boat, or by the officers or crew, done in connection with the business of such boat.

Sec. 926. Claims growing out of any of the above causes are liens upon such boat, its apparel, tackling, furniture and appendages, including barges and lighters, if owned by the owners of such boat, and used therewith, at the time suit is commenced.

Sec. 927. Such liens shall take preference of any claim against the boat itself, or any or all of its owners, growing out of any other causes than those above enumerated, and as between themselves they shall be preferred in the following order:

1. Those resulting from wages for services on board such boat within the year then passed; *Providing*, That such suit is brought within twenty days after the cessation of such labor.

2. Those resulting from contracts made within this State.

3. All other causes.

Sec. 928. Actions against boats under the provisions of this Chapter shall not be brought after the lapse ot one-year from the time the cause of action accrued.

Sec. 929. The lien shall attach from the commencement of the suit, subject only to such other liens as are of a preferred class.

Sec. 930. Any raft found in any of the waters of this State shall be liable for all debts contracted by the owner, clerk, pilot or agent thereof, on account of work done or services rendered for such raft. Claims growing out of either of the above causes shall be a lien upon the raft, its tackling and appendages, for the term of twenty days from the time the right thereof accrued, and the same rules shall govern, and the same process shall be had, that are prescribed for similar liens against boats.

Sec. 931. Any person desiring to take the benefit of this Chapter shall file with the clerk of any court, or justice of the peace, having jurisdiction, a complaint in writing, duly verified by the plaintiff, or his agent or attorney, which complaint shall show that the plaintiff is entitled to the benefit of this Chapter; whereupon such clerk, or justice of the peace, shall issue a writ of attachment to the proper officer, commanding him to seize the boat, its tackling, apparel, furniture, and appendages, and retain the same until released by due course of law.

Sec. 932. The complaint shall describe the boat by name as defendant, but if it have no name, then by such description as will enable the officer attaching to seize the proper property.

Sec. 933. The usual summons shall be issued, directed to the boat by name, or to the property to be attached, if no name appear, and be served upon the master, owner, clerk, agent, or consignee thereof, and if none of them can be found, by posting up a copy in some conspicuous part of the boat, or property to be attached. The writ shall be served according to the directions it contains.

Sec. 934. Any sheriff, constable or city marshal, may serve the writ and summons above mentioned, whether the same issue from the office of the clerk, or from a justice of the peace, and any clerk or justice may, in his discretion, appoint any suitable person to serve such summons and writ, who shall have all the power of a sheriff in the premises.

Sec. 935. Any master, agent, clerk, consignee, or other person interested in the boat, may appear by himself, his agent or attorney, for the defendant, and conduct the defence of the suit, and no continuance shall be granted to the plaintiff while the boat is in custody.

Sec. 936. The boat may be discharged at any time before final judgment by giving bonds with at least two sureties, to be approved by the officer serving the writ or by the clerk or justice who issued it, in a penalty double the plaintiff's demand and costs, conditioned that the obligors will pay the amount found due to the plaintiff with costs.

Sec. 937. If judgment be rendered against the boat before it is discharged, as provided in the last section, execution shall be issued against it, together with its apparel, tackling, furniture and appendages.

Sec. 938. The officer may sell any of the furniture and appendages of the boat, if by doing so he can satisfy the demand; if he sell the boat itself he must sell it to the bidder who will advance the amount necessary to satisfy the execution for the lowest fractional share of the boat, unless the person appearing for the boat require a different and equally convenient mode of sale.

Sec. 939. If the fractional share of the boat be thus sold, the purchaser shall hold such share of interest jointly with the owners.

Sec. 940. Nothing herein contained shall affect the right of a plaintiff to sue in the same manner as in other cases, notwithstanding the provisions of this Chapter.

Sec. 941. It shall be sufficient for the plaintiff to allege in his complaint or affidavit that the services were rendered or material was furnished the boat by its name.

TITLE XI.

PROCEEDINGS IN JUSTICES' COURTS.

Chapter I. Place of Trial of Actions in Justices' Courts.
" *II. Manner of Commencing Actions in Justices' Courts.*
" *III. Pleadings in Justices' Courts.*
" *IV. Provisional Remedies in Justices' Courts.*
" *V. Judgment by Default in Justices' Courts.*
" *VI. Time of Trial and Postponements in Justices' Courts.*
" *VII. Trials in Justices' Courts.*
" *VIII. Judgments (other than by default) in Justices' Courts.*
" *IX. Executions from Justices' Courts.*
" *X. Contempts in Justices' Courts.*
" *XI. Dockets of Justices.*
" *XII. General Provisions Relating to Justices' Courts.*

CHAPTER I.

PLACE OF TRIAL OF ACTIONS IN JUSTICES' COURTS.

Section 945. Actions, in what township or city may be commenced.
" *946. Place of trial may be changed in certain cases.*
" *947. Limitation on the right to change.*
" *948. To what court transferred.*
" *949. Proceedings after order changing place of trial.*
" *950. Effect of an order changing place of trial.*
" *951. Transfer of cases to District Court.*

Sec. 945. Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this Chapter provided, must be tried:

1. If there be no justice's court for the township, town or city, in which the defendant resides, or there is no organized township where the defendant resides—in any city, town or township of the county.

2. When two or more persons are jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different towns or cities of the same county, or in different

counties—in the township, town or city in which any of the persons liable may reside.

3. In cases of injury to the person or property—in the township, town or city where the injury was committed, or where the defendant resides.

4. If for the recovery of personal property, or the value thereof, or damages for taking or detaining the same—in the township, town or city in which the property may be found, or in which the property was taken, or in which the defendant resides.

5. When the defendant is a non-resident of the county—in any township, town or city where he may be found.

6. When the defendant is a non-resident of the State—in any township, town or city in the State.

7. When a person has contracted to perform an obligation at a particular place, and resides in another county, or township, town or city—in the township, town or city in which such obligation is to be performed, or in which he resides; and the township, town or city in which the obligation is incurred shall be deemed to be the township, town or city in which it is to be performed, unless there is a special contract to the contrary.

8. When the parties voluntarily appear and plead without summons—in any township, town or city in the State.

9. In all other cases, in the township, town or city in which the defendant resides.

Sec. 946. The court may, at any time before trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party.

2. When either party makes and files an affidavit that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice.

3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township, town or city against him.

4. When, from any cause, the justice is disqualified from acting.

5. When the justice is sick or unable to act.

Sec. 947. The place of trial cannot be changed, on motion of the same party, more than once, upon any or all the grounds specified in the first, second and third subdivisions of the preceding section. The affidavit mentioned in the said subdivisions must state the facts.

Sec. 948. When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties may agree upon; and if they do not so agree, then to another justice's court in the same county.

Sec. 949. After an order has been made, transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein.

2. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue a notice, stating when and where the trial will take place, which notice must be served upon the parties at least a day before the time fixed for trial. If no answer or demurrer has been made by the defendant he must be allowed to plead.

Sec. 950. From the time the order changing the place of trial is made, the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court.

Sec. 951. The parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, nor can any issue presenting such question be tried by such court; and if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and, if any of the pleadings are oral, a transcript of the same, from his docket to the clerk of the District Court of the county; and from the time of filing such pleadings or transcript with the clerk, the District Court shall have over the action the same jurisdiction as if it had been commenced therein; *Provided*, that in cases of forcible entry and unlawful detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined. When the action is certified to the District Court, upon the answer of the defendant, he must file an undertaking, to be approved by the justice, to the effect that he will pay all costs that may be awarded against him on the trial in the District Court.

CHAPTER II.

MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS.

Section 955. Actions, how commenced.
" *956. Summons may issue within a year.*
" *957. Defendant may waive summons.*
" *958. Parties may appear in person or by attorney.*
" *959. When guardian necessary, how appointed.*

Section 960. Summons, how issued, directed, and what to contain.
" *961. Time for appearance of defendant.*
" *962. Alias summons.*
" *963. Same.*
" *964. Summons, limitation upon time of service.*
" *965. Summons, by whom and how served and returned.*
" *966. Hour for appearance.*

Sec. 955. An action in a justice's court is commenced by filing a copy of the account, note, bill, bond, or instrument upon which the action is brought, with a statement of the amount due thereon, or a concise statement in writing of the cause of action, either of which is deemed a complaint.

Sec. 956. The court must indorse on the complaint the date upon which it was filed, and at any time within one year thereafter the plaintiff may have summons issued.

Sec. 957. At any time after the complaint is filed, the defendant may, in writing, or by appearing and pleading, waive the issuing of summons.

Sec. 958. Parties in justice's court may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney.

Sec. 959. When an infant, insane or incompetent person is a party, he must appear either by his general guardian, if he have one, or by a guardian *ad litem* appointed by the justice. When a guardian *ad litem* is appointed by the justice, he must be appointed as follows:

1. If the infant, insane, or incompetent person be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, or if insane or incompetent, upon the application of a relative or friend.

2. If the infant, insane, or incompetent person be defendant, the appointment must be made at the time the summons is returned, or before the answer, upon the application of the infant, if he be of the age of fourteen years, and apply at or before the summons is returned. If he be under the age of fourteen years, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend, or any other party to the action, or by the justice, on his own motion.

Sec. 960. The summons must be directed to the defendant and signed by the justice, and must contain:

1. The title of the court, the name of the county and city or township in which the action is commenced, and the names of the parties thereto.

2. A sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him.

3. A direction that the defendant appear and answer before the justice, at his office, as specified in the next section. And that if he fail to appear and answer, judgment will be taken against him according to the complaint.

Sec. 961. The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest be indorsed upon the summons, forthwith.

2. In all other cases it shall be returnable in not less than four nor more than ten days from its date, and shall be served at least four days before the time for appearance.

Sec. 962. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons in the same form as the original, except that he may fix the time for the appearance of the defendant at a period not exceeding ninety days from its date.

Sec. 963. The justice may, within a year from the date of filing the complaint, issue as many alias summons as may be demanded by the plaintiff.

Sec. 964. The summons cannot be served out of the county of the justice before whom the action is brought, except when the action is brought upon a joint contract or obligation of two or more persons, who reside in different counties, and the summons has been served upon thedefendant, resident of the county, in which case the summons may be served upon the other defendant out of the county; and except, also, when an action is brought against a party who has contracted to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides; and except, also, where an action is brought for an injury to person or property, and the defendant resides in a different county, in which case summons may be served in the county where defendant resides.

Sec. 965. The summons may be served by a sheriff or constable of any of the counties of this State; *Provided*, that when a summons, issued by a justice of the peace, is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons; or the summons may be served by any male resident, over the age of twenty-one years, not a party to the suit, within the county where the action is brought, and must be served and returned as provided in Title V., Part II., of this Code (Sections 345-348), or it may be served by publication, and Sections 354-355, so far as they relate to publication of summons, are made applicable to justices' courts; the word "justice" being substituted for the word "judge," whenever the latter word occurs.

Sec. 966. When all parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiffs and the defendants who have appeared, thereof. The parties are entitled to one hour in which to appear after the time fixed in said notice, but are not bound to remain longer than that time, unless both parties have appeared, and the justice, being present, is engaged in the trial of another cause.

CHAPTER III.

PLEADINGS IN JUSTICES' COURTS.

Section 970. Form of pleadings.
" *971. Pleadings in justices' courts.*
" *972. Complaint defined.*
" *973. When demurrer to complaint may be put in.*
" *974. Answer.*
" *975. If the defendant omits to set up counterclaim.*
" *976. When answer contains new matter.*
" *977. Proceedings on demurrer.*
" *978. New matter deemed denied.*
" *979. Amendment of pleadings.*
" *980. Answer or demurrer to amended pleadings.*
" *981. Copy of account or instrument to be filed.*
" *982. Copy deemed genuine if not denied.*
" *983. Variance.*

Sec. 970. Pleadings in justices' courts:

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

2. May, except the complaint, be oral or in writing.

3. Must not be verified unless otherwise provided in this Title.

4. If in writing, must be filed with the justice.

5. If oral, an entry of their substance must be made in the docket.

6. In cases of forcible entry and unlawful detainer, pleadings must be verified.

Sec. 971. The pleadings are:

1. The complaint by the plaintiff.
2. The demurrer to the complaint.
3. The answer by the defendant.
4. The demurrer to the answer.

Sec. 972. The complaint in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based.

Sec. 973. The defendant may, at any time before answering, demur to the complaint, upon the grounds mentioned in Section 378, of this Code, except the ground mentioned in Subdivision 5.

Sec. 974. The answer may contain a general denial of any or all the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, or any other facts containing a defence or counterclaim, upon which an action might be brought by the defendant against the plaintiff in a justice's court. He may file a copy of an account, note, bill, bond or other instrument as a counterclaim.

Sec. 975. If the defendant omit to set up a counterclaim in the cases mentioned in the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor. If the counterclaim exceeds three hundred dollars he need not set it up.

Sec. 976. When the answer contains new matter in avoidance, constituting a defence or counterclaim, the plaintiff may, at any time before the trial, demur to the same for insufficiency, stating therein the grounds of such demurrer, which may be the same as mentioned in Section 404, of this Code, except the first subdivision thereof.

Sec. 977. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint.

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith.

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow.

4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed.

Sec. 978. The new matter contained in the answer or counterclaim is deemed denied by the plaintiff.

Sec. 979. Either party may, at any time before the conclusion of the trial, amend any pleading, but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will by the amendment be rendered necessary, require, as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars. The court may also, on such terms as may be just, and on the payment of costs, relieve a party from any judgment taken against him by mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after the entry of the judgment and upon an affidavit showing good cause therefor.

Sec. 980. When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow.

Sec. 981. When the cause of action or the defence or counterclaim, arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument, to the party demanding it, and to state that there is due to him thereon from the adverse party a specified sum, but the court may, at any time, require the original account or instrument to be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited, and a copy furnished, may prohibit its being afterwards given in evidence, unless it appear that such instrument is not in the possession of the party pleading it, or under his control. The court may at any time require either party to furnish to the other, the items of an account or a bill of particulars.

Sec. 982. If the plaintiff annex to his complaint, or file with the justice at the time of issuing the summons, a copy of the promissory note, bill of exchange, other obligation for the payment of money, or other instrument upon which the action is brought, the defendant shall be deemed to admit the genuineness of all the signatures thereto, unless he specifically deny the same in his answer under oath. In case of a counterclaim the same rule applies to the plaintiff.

Sec. 983. A variance between the proof on the trial and the allegations in pleading shall be disregarded as immaterial unless the court be satisfied that the adverse party has been misled to his prejudice thereby.

CHAPTER IV.

PROVISIONAL REMEDIES IN JUSTICES' COURTS.

Article I. Arrest and Bail.
" II. Attachment.
" III. Claim and Delivery of Personal Property.

ARTICLE I.

ARREST AND BAIL.

Section 986. Order of arrest and arrest of defendant.
" 987. Affidavit and undertaking for order of arrest.
" 988. A defendant arrested must be taken before the justice immediately.
" 989. The officer must give notice to the plaintiff of arrest.
" 990. The officer must detain the defendant.
" 991. Defendant's answer.
" 992. Provisions applicable.

Sec. 986. An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the cases mentioned in Section 462, of this Code.

Sec. 987. Before an order of arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of three hundred dollars, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking.

Sec. 988. The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or if it appears to him by the affidavit of defendant, that he is a material witness in the action, the officer must immediately take the defendant before another justice of the town, township or city, if there is another, and if not, then before a justice of an adjoining township, who must take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

Sec. 989. The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons and subscribe a certificate, stating the time of serving the same, the time of arrest, and of his giving notice to the plaintiff.

Sec. 990. The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice. The officer shall not be bound to keep such person under arrest more than twenty-four hours, unless the plaintiff advance each day the expenses of keeping such person, which expense shall be taxed as costs in the action, and in no case shall be a charge against the county.

Sec. 991. The defendant may file an answer, under oath, putting in issue the facts stated in the affidavit for the order of arrest, which may be tried by the court unless a jury is demanded, and the plaintiff shall be held to establish such facts, and if he fail to do so, the order of arrest shall be dismissed, and the defendant may proceed upon the undertaking of the plaintiff for his damages occasioned by the arrest. The defendant may apply to the court to be discharged from arrest, upon the ground of the insufficiency of the papers on which the order of arrest was granted.

Sec. 992. The provisions of Chapter III., Title III., Part III., of this Code, in relation to the examination and discharge of a defendant imprisoned on execution in a civil action, shall apply to justices' courts, and justices of the peace shall have the same powers in their courts as are by said sections granted to the judge.

ARTICLE II.

ATTACHMENT.

Section 1000. Writ of attachment shall issue upon affidavit.
" *1001. Undertaking on an attachment must be required.*
" *1002. Writ of attachment, substance of. Officer may take an undertaking instead of levying.*
" *1003. Certain provisions apply to all attachments in justices' courts.*

Sec. 1000. A writ to attach the property of the defendant must be issued by the justice at the time of or after issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in Section 543, of this Code.

Sec. 1001. Before issuing the writ the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than fifty nor more than three hundred dollars, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Sec. 1002. The writ may be directed to the sheriff or any constable of the county, or the sheriff of any other county, and must require him to attach and safely keep all the property of the defendant in his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant has given him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, in which case to take such undertaking.

Sec. 1003. The sections of this Code from Section 546 to Section 576, both inclusive, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "justice," whenever the writ is directed to a constable, and the word "justice" substituted for "judge."

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL RROPERTY.

Section 1005. How claim and delivery enforced.

Sec. 1005. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons, or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this Code, from Section 501 to Section 519, both inclusive, are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge," and the justice, instead of the plaintiff or his attorney, may, in his discretion, by an indorsement in writing upon the affidavit, order the sheriff or constable to take the property mentioned in the affidavit.

CHAPTER V.

JUDGMENT BY DEFAULT IN JUSTICES' COURTS.

Section 1007. Judgment when defendant fails to appear.
" 1008. Judgment against defendant on demurrer.

Sec. 1007. If the defendant fails to appear and answer or demur within the time specified in the summons, or one hour thereafter, then, upon proof of service of summons the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such sum (not exceeding the amount stated in the summons) as appears by such evidence to be just.

Sec. 1008. In the following cases the same proceedings must be had, and judgment must be rendered in like manner, as if the defendant had failed to appear and answer or demur:

1. If the complaint has been amended and the defendant fails to answer it as amended within the time allowed by the court.

2. If the demurrer to the complaint is overruled and the defendant fails to answer at once.

3. If the demurrer to the answer is sustained and the defendant fails to amend the answer within the time allowed by the court.

CHAPTER VI.

TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS.

Section 1010. Time when trial must be commenced.
" 1011. When court may, of its own motion, postpone trial.
" 1012. Postponement by consent.
" 1013. Postponement upon application of a party.
" 1014. No continuance for more than ten days to be granted, unless upon filing of undertaking.

Sec. 1010. Unless postponed as provided in this Chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the notice mentioned in Section 966, and the trial must proceed and there must be no adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of.

Sec. 1011. The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time fixed by law, or by an order of the court for the trial, the court is engaged in the trial of another action.

2. For not exceeding two days, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary.

3. For not exceeding three days, if the trial is upon issues of fact and a jury has been demanded.

Sec. 1012. The court may, by the consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

Sec. 1013. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so.

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody; but the action may proceed notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged.

3. If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the justice may order the defendant discharged from custody.

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony

so taken may be read on trial, with the same effect, and subject to the objections, as if the witness was produced. But the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given, on the trial, or offered and overruled as improper, the trial must not be postponed.

Sec. 1014. No adjournment must, unless by consent, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, in an amount fixed by the justice, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

CHAPTER VII.

TRIALS IN JUSTICES' COURTS.

Section 1018. Issue defined, and the different kinds.
" *1019. Issue of law, how raised.*
" *1020. Issue of fact, how raised.*
" *1021. Issue of law, how tried.*
" *1022. Issue of fact, how tried.*
" *1023. Jury, how waived.*
" *1024. Either party failing to appear, trial may proceed at request of other party.*
" *1025. Challenges to jurors.*

Sec. 1018. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Sec. 1019. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

Sec. 1020. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matter in the answer, except an issue of law is joined thereon.

Sec. 1021. An issue of law must be tried by the court.

Sec. 1022. An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

Sec. 1023. A jury may be waived:

1. By consent of parties entered in the docket.
2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact.
3. By the failure of either party to appear at the time fixed for the trial of an issue of fact.

Sec. 1024. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

Sec. 1025. The challenges are either peremptory or for cause. Each party is entitled to two peremptory challenges. Either party may challenge for cause on any grounds set forth in Section 650. Challenges for cause must be tried by the justice.

CHAPTER VIII.

JUDGMENTS (OTHER THAN BY DEFAULT) IN JUSTICES' COURTS.

Section 1028. Judgment by confession.
" *1029. Judgment of dismissal entered in certain cases without prejudice.*
" *1030. Judgment upon verdict.*
" *1031. Judgment after trial by the court.*
" *1032. Judgment when the defendant is subject to arrest.*
" *1033. Actions against joint debtors.*
" *1034. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.*
" *1035. Judgment upon counter claim.*
" *1036. Offer to compromise before trial.*
" *1037. Costs may be included in the judgment.*
" *1038. Abstract of judgment.*
" *1039. Abstract may be filed and docketed in district clerk's office.*
" *1040. Effect of docketing.*
" *1041. Judgment not a lien unless abstract is recorded in the county clerk's office.*

Sec. 1028. Judgment upon confession may be entered up in any justice's court specified in the confession, as provided in Chapter I., Title III., Part III., of this Code.

Sec. 1029. Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs in the following cases:

1. When the plaintiff voluntarily dismisses the action at or before the close of his evidence when there is no counterclaim.
2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter.
3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court.
4. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, town, or city; but if the objection is taken and over-

ruled, it is cause of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial, it is waived.

Sec. 1030. When a trial by jury has been had, judgment must be entered by the justice, at once, in conformity with the verdict.

Sec. 1031. When the trial is by the court, judgment must be entered at the close of the trial.

Sec. 1032. The judgment in an action for claim and delivery in justices' courts must be entered substantially in the form required by Section 731, of this Code. When the judgment is rendered in a case where the defendant is subject to arrest and imprisoment thereon, the fact that the defendant is so subject, must be stated in the judgment.

Sec. 1033. If the action be on a contract against two or more defendants, and the summons be served on one or more but not on all, the judgment shall be entered up only against those who were served, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all and the separate property of the defendants served.

Sec. 1034. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be entered for the residue.

Sec. 1035. Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess.

Sec. 1036. If the defendant, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum in excess of the offer, he cannot recover costs, but costs must be adjudged against him, and, if he recover, be deducted from his recovery. The offer and failure to accept cannot be given in evidence nor affect the recovery, otherwise than as to costs.

Sec. 1037. The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

Sec. 1038. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts):

State of Montana, ———county.
———plaintiff, vs. ———defendant.
In justice's court, before———, justice of the peace.
———township (city or town), ———, 18 , (inserting date of abstract). Judgment entered for plaintiff (or defendant) for $——, on the——day of——. I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, or (as the case may be) in the court of ——, justice of the peace, as it appears by his docket now in my possession, as his successor in office.
————Justice of the Peace.

Sec. 1039. The abstract may be filed in the office of the clerk of the District Court of the county in which the judgment was rendered, and the judgment docketed in the judgment docket of the District Court thereof. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket.

Sec. 1040. From the time of docketing in the clerk's office execution may be issued thereon by the clerk to the sheriff of any county in the State, other than the county in which the judgment was rendered, in the same manner and with like effect as if issued on a judgment of the District Court.

Sec. 1041. A judgment rendered in a justice's court creates no lien upon any lands of the defendant, unless such an abstract is filed in the office of the county clerk of the county in which the lands are situated. When so filed, and from the time of filing, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for six years, unless the judgment be previously satisfied.

CHAPTER IX.

EXECUTIONS FROM JUSTICES' COURTS.

Section 1043. Execution may issue at any time within six years.
" *1044. Execution, contents of.*
" *1045. Renewal of execution.*
" *1046. Duty of officer receiving execution.*
" *1047. Proceedings supplementary to execution.*

Sec. 1043. Execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment or his successor in office, on the application of the party entitled thereto, at any time within six years from the entry of judgment.

Sec. 1044. The execution must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice and bear date the day of its delivery to the officer. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and the township, town or city where, and the time when, it was rendered; the amount of judgment, if it be for money; and if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable, as are required by the provisions of Title IX., Part II., of this Code, in an execution to the sheriff.

Sec. 1045. An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterward issued.

Sec. 1046. The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required by the provisions of Title IX., Part II., of this Code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff.

Sec. 1047. The sections of this Code, from 780 to 787, both inclusive, are applicable to justices' courts, the word "constable" being substituted to that end, for the word "sheriff," and the word "justice" for the word "judge."

CHAPTER X.

CONTEMPTS IN JUSTICES' COURTS.

Section 1050. Contempts a justice may punish for.
" *1051. Proceedings for contempt.*
" *1052. Same.*
" *1053. Punishments for contempts.*
" *1054. The conviction must be entered in the docket.*

Sec. 1050. A justice may punish, as for contempt, persons guilty of the following acts, and no other:

1. Disorderly, contemptuous, or insolent behavior toward the justice while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

2. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding.

3. Disobediance or resistance to the execution of a lawful order or process, made or issued by him.

4. Disobedience to a subpoena duly served, or refusing to be sworn or to answer as a witness.

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him.

Sec. 1051. When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

Sec. 1052. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defence, or excuse, must be given. The justice may thereupon discharge him or may convict him of the offence.

Sec. 1053. A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed in any one case one hundred dollars, and such imprisonment one day.

Sec. 1054. The conviction, specifying particularly the offence and the judgment thereon, must be entered by the justice in his docket.

CHAPTER XI.

DOCKETS OF JUSTICES.

Section 1057. Docket, what to contain.
" *1058. Entries therein primary evidence of the facts.*
" *1059. An index to the docket must be kept.*
" *1060. Dockets must be delivered by justice to his successor, or to county clerk.*
" *1061. Proceedings when office becomes vacant, and before a successor is appointed.*
" *1062. Docket of predecessor.*
" *1063. Justice elected to fill vacancy.*
" *1064. Justices equally entitled.*

Sec. 1057. Every justice must keep a book, denominated a "Docket," in which he must enter:

1. The title of every action or proceeding.

2. The object of the action or proceeding; and if a sum of money be claimed, the amount thereof.

3. The date of the summons and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact.

4. The time when the parties, or either of them, appear, or their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleadings.

5. Every adjournment, stating on whose application and to what time.

6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial.

7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request.

8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge.

9. The judgment of the court, specifying the costs included, and the time when rendered, and an itemized statement of the costs.

10. The issuing of the execution, when issued and to whom; the renewals thereof, if any, and when made, and a statement of any money paid to the justice, when and by whom.

11. The receipt of a notice of appeal, if any be given, and of the undertaking on appeal, if any be filed.

Sec. 1058. The several particulars of the last section specified must be entered under the title of the action to which they relate, and (unless otherwise in this Title provided) at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are *prima facie* evidence of the facts so stated.

Sec. 1059. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs and defendants must be entered in the index, in the alphabetical order of the first letter of the family name.

Sec. 1060. Every justice of the peace, upon the expiration of his term of office must deposit with his successor his official dockets, and all papers filed in his office, his own as well as those of his predecessors, or any other which may be in his custody to be kept as public records.

Sec. 1061. If the office of a justice become vacant by his death or removal from the township, town or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him delivered to the successor of such justice. If there is no other justice in the township, then the docket and papers of such justice must be deposited in the office of the county clerk, to be by him delivered to the successor in office of the justice.

Sec. 1062. Any justice with whom the docket of his predecessor or of any other justice is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purpose of this section, considered the successor of such former justice.

Sec. 1063. The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township, town or city, from that time is the successor.

Sec. 1064. When two or more justices are equally entitled, under the last section, to be deemed the successors in office of the justice, a judge of the District Court must, by a certificate subscribed by him and filed in the office of the county clerk, designate which justice is the successor of the justice going out of office, or whose office has become vacant.

CHAPTER XII.

GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

Section 1067. Justices may issue subpoenas and final process to any part of the county.
“ *1068. Blanks must be filled in all papers issued by a justice, except subpoenas.*
“ *1069. Justices to receive all moneys collected and pay same to parties.*
“ *1070. In case of disability of justice, another justice may attend on his behalf.*
“ *1071. Justices may require security for costs.*
“ *1072. Who entitled to costs.*
“ *1073. What provisions of Code applicable to justices' courts.*
“ *1074. Deposit in lieu of undertaking.*
“ *1075. Special deputy.*
“ *1076. Authority of deputy.*
“ *1077. Execution of process by retiring constable.*
“ *1078. Depositions, how taken.*
“ *1079. When name of defendant is unknown.*
“ *1080. How appeals may be taken.*

Sec. 1067. Justices of the peace may issue subpoenas in any action or proceedings in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

Sec. 1068. The summons, execution and other papers made or issued by a justice, except a subpoena, must be issued without a blank left to be filled by another, otherwise it is void.

Sec. 1069. Justices of the peace must receive from the sheriff or constables of their county, all moneys collected on any process or order issued from their courts respectively, and must pay the same, and all moneys paid to them in their official capacity, over to the parties entitled or authorized to receive them, without delay.

Sec. 1070. In case of the sickness or other disability, or necessary absence of a justice, on a return of a summons, or at the time appointed for a trial, another justice of the same township, town or city, or adjoining township, may at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom, the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

Sec. 1071. Justices may, in all cases, require a deposit of money or an undertaking, as security for costs of court, before issuing a summons.

Sec. 1072. The prevailing party in justices' courts is entitled to costs of the action, and also of any proceedings taken by him in aid of an execution, issued upon any judgment recovered therein.

Sec. 1073. Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this Code which are, in their nature, applicable to the organization, powers and course of proceedings in justices' courts, or which have been made applicable by special provisions in this Title, are applicable to justices' courts and the proceedings therein.

Sec. 1074. In civil cases arising in justices' courts, wherein an undertaking is required as prescribed in this Code, the plaintiff or defendant may deposit with said justice a sum of money equal to the amount required by said undertaking, which said sum of money shall be taken as security in place of said undertaking.

Sec. 1075. A justice may, at the request of a party, and on being satisfied that it is expedient, specially depute any proper person of suitable age, and not interested in the action, to serve a summons with or without an order to arrest the defendant or with or without a writ of attachment or an execution. The justice shall be liable on his official bond for all official acts of the person so deputed. Such deputation shall be in writing made on the process, and a note thereof made in the justice's docket.

Sec. 1076. The person so deputed shall have the authority of a constable in relation to the service, execution and return of such process, and shall be subject to the same obligations.

Sec. 1077. A constable, notwithstanding the expiration of his term of office, may proceed and complete the execution of all final process which he has begun to execute, in the same manner as if he were still in office, and his sureties shall be liable to the same extent.

Sec. 1078. Depositions to be used in justices' courts may be taken as provided in Chapter III., Title III., Part III., of this Code.

Sec. 1079. Where the plaintiff is ignorant of the name, or part of the name of a defendant, that defendant may be designated in the summons; and in any other process or proceeding in the action, by a fictitious name, or by so much of his name as is known, adding a description, identifying the person intended. The person so designated must thereupon be regarded as a defendant in the action, and as sufficiently described therein for all purposes. When his name, or the remainder of his name is known, or becomes known, the justice, before whom the action is pending, must amend the proceedings already taken, by the insertion of the true or full name, in place of the fictitious name, or part of a name; and all subsequent proceedings must be taken under the name so inserted.

Sec. 1080. Appeals may be taken from a judgment of a justice's court, as provided in Chapter III., Title XIII., Part II., of this Code.

TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS.

Section 1085. How commenced.
" 1086. Summons must issue on filing complaint.
" 1087. Defendant may plead orally or in writing.
" 1088. Proceedings to be conducted as in justices' courts.

Sec. 1085. Civil actions in police courts are commenced by filing a complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title and section, and the number thereof.

Sec. 1086. Immediately after filing the complaint, a summons must be issued, directed to the defendant, and returnable either immediately or at any time designated therein, not exceeding four days from the date of its issuing.

Sec. 1087. On the return of the summons the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried, unless, for good cause shown, an adjournment is granted.

Sec. 1088. All proceedings in civil actions in police courts must, except as in this Title otherwise provided, be conducted in the same manner as civil actions in justices' courts.

TITLE XIII.

APPEALS IN CIVIL ACTIONS.

Chapter I. Appeals to Supreme Court.
" *II. Appeals to District Court.*

CHAPTER I.

APPEALS TO SUPREME COURT.

Section 1090. Judgments and orders may be reviewed.
" *1091. Party aggrieved may appeal—names of parties.*
" *1092. When an appeal may be taken.*
" *1093. Within what time an appeal may be taken.*
" *1094. Appeal, how taken.*
" *1095. Undertaking for three hundred dollars.*
" *1096. Undertaking to stay proceedings.*
" *1097. Judgment for delivery of documents.*
" *1098. Judgment directing execution of conveyance.*
" *1099. Undertaking concerning real property.*
" *1100. Stay of proceedings and court may limit security.*
" *1101. Undertakings may be in one instrument.*
" *1102. Justification of sureties.*
" *1103. Stay of proceedings not allowed.*
" *1104. Appeals by executors and administrators.*
" *1105. Acts of same when appointment vacated.*
" *1106. What papers used on appeal from judgment.*
" *1107. What papers used on appeal from an order.*
" *1108. What papers used on granting or refusing new trial.*
" *1109. Transcript, how certified.*
" *1110. When an appeal may be dismissed.*
" *1111. Effect of dismissal.*
" *1112. What may be reviewed on appeal from judgment.*
" *1113. Remedial powers of an appellate court.*
" *1114. Remittitur must be certified to the clerk of the District Court.*

Sec. 1090. A judgment or order in a civil action, except when expressly made final by this Code, may be reviewed as prescribed in this Title, and not otherwise.

Sec. 1091. A party aggrieved may appeal in the cases prescribed in this Title. The party appealing is known as the appellant, and the adverse party as the respondent.

Sec. 1092. An appeal may be taken to the Supreme Court, from a District Court, in the following cases:

1. From a final judgment entered in an action or special

proceeding commenced in a District Court, or brought into a District Court from another court.

2. From an order granting or refusing a new trial; or granting or dissolving an injunction; or refusing to grant or dissolve an injunction; or dissolving or refusing to dissolve an attachment; from any special order made after final judgment; and from such interlocutory judgments or orders in actions for partition as determines the rights and interests of the respective parties and directs partition to be made.

3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, or administrator, or guardian; or refusing, allowing, directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart a homestead.

Sec. 1093. An appeal may be taken:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the entry of judgment.

2. From a judgment rendered, on an appeal from an inferior court, within ninety days after the entry of such judgment.

3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from any special order made after final judgment; and from an interlocutory judgment or order in actions for partition of real property, and from an order confirming, changing, modifying or setting aside the report in whole or in part, of the referees in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court or filed with the clerk.

4. From the judgments or orders mentioned in Subdivision 3 of the next preceding section, within sixty days after the judgment or order is made or entered, or filed with the clerk.

Sec. 1094. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing.

Sec. 1095. The undertaking on appeal must be in writing, and must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.

Sec. 1096. If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs, which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated.

Sec. 1097. If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court, upon the appeal.

Sec. 1098. If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

Sec. 1099. If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding the sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

Sec. 1100. Whenever an appeal is perfected, as provided in the preceding sections of this Chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action and not effected by the order appealed from. And the court below may, in its discretion, dispense with or limit the security required by this Chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double of the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained, and unless, within five days after the entry of the order appealed from, such appeal be perfected.

Sec. 1101. The undertakings prescribed in the foregoing sections may be in one instrument or several, at the option of the appellant. In case of an appeal from a final judgment, and from an order granting or refusing a new trial, taken at the same time, only one undertaking need be given, as prescribed in Section 1094, of this Code. The sureties on such an undertaking must justify as required by Section 1204, of this Code.

Sec. 1102. The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in this

Chapter, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the District Court, or the clerk thereof, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this Title, a deposit, in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

Sec. 1103. In cases not provided for in Sections 1096, 1097, 1098 and 1099, the perfecting of the appeal by giving the undertaking, or making the deposit mentioned in Section 1095, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court. And except also, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding public office, civil or military, within this State. Also except where a judgment grants a writ of mandamus, or of prohibition, against a tribunal, corporation, public officer or board, commanding certain acts to be done which ought to be done, or prohibiting acts which ought not to be done by such tribunal, corporation, public officer or board, and not involving the payment or allowance of money or its equivalent.

Sec. 1104. When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of the District Court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and his sureties thereon shall be liable as on such undertaking.

Sec. 1105. When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

Sec. 1106. On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial.

Sec. 1107. On appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.

Sec. 1108. On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in Section 724, of this Code.

Sec. 1109. The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or the stipulation of the parties waiving an undertaking.

Sec. 1110. If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking approved by a justice of the Supreme Court, be filed in the Supreme Court before the hearing upon motion to dismiss the appeal.

Sec. 1111. The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

Sec. 1112. Upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.

Sec. 1113. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed, and for relief in such cases the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.

Sec. 1114. When judgment is rendered upon the appeal, it must be certified by the clerk of the Supreme Court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court, the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed or modified by the Supreme Court on appeal.

CHAPTER II.

APPEALS TO DISTRICT COURTS.

Section 1118. Appeal from judgment of justice's or police court.
" *1119. Must be tried anew.*
" *1120. Transmission of papers to appellate court.*
" *1121. Undertaking on appeal.*
" *1122. Effect of appeal.*
" *1123. Stay of proceedings on filing undertaking.*
" *1124. Powers of District Court on appeal.*
" *1125. Defective undertaking.*

Sec. 1118. Any party dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the District Court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party or his attorney.

Sec. 1119. All appeals from justices' or police courts must be tried anew in the District Court, on the papers filed in the justice's or police court, unless the court, for good cause shown, and on such terms as may be just, allow other or amended pleadings to be filed in such action. The court may order new or amended pleadings to be filed. Each party has the benefit of all legal objections made in the justice's or police court. When a judgment is reversed or set aside on a question of law arising in the justice's or police court, the District Court must either try the case anew or render a judgment. There is no appeal from a judgment by default rendered in a justice's or police court, except on questions of law which appear on the face of the papers or proceedings, and except in cases when the justice's or police court has abused its discretion in setting aside or refusing to set aside a default or judgment. If the judgment by default is set aside, the District Court must allow pleadings to be filed and try the case.

Sec. 1120. Upon receiving the notice of appeal, and filing an undertaking as required in the next section, the justice or judge must, within ten days, upon the payment of the fees therefor, transmit to the clerk of the District Court a certified copy of his docket, the pleadings, all notices, motions and other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the District Court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney.

Sec. 1121. An appeal from a justice's or police court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the District Court. When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the District Court, and will obey any order made by the court therein. When the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the appeal be dismissed or withdrawn, or the judgment affirmed, or judgment be recovered against him in the action in the District Court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; or that he will pay any judgment and costs that may be recovered against him in said action in the District Court, not exceeding a sum to be fixed by the justice of the court from which the appeal is taken, and which sum must be specified in the undertaking. A deposit of the amount of the judgment, including all costs appealed from, or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking, and in such cases the justice or judge must transmit the money to the clerk of the District Court, to be by him paid out on the order of the court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

Sec. 1122. If the party in whose favor the judgment is rendered appeals, the undertaking must be in the sum of one hundred dollars, and conditioned that he will pay all costs that may be awarded against him, and obey any order of court made in the action. If the party appealing fails to reduce the judgment against him, or to enlarge the judgment in his favor appealed from, ten dollars or more, or reverse the same in the District Court, he shall not recover any costs of appeal. The sureties on the undertaking mentioned in this and the preceding sections, must justify as provided in Section 1204.

Sec. 1123. If an execution be issued, on the filing of the undertaking, the justice or judge must direct the officer to stay all proceedings on the same. Such officer must, upon the payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees on the execution be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

Sec. 1124. When the action is tried anew on appeal, the trial must be conducted in all respects as other trials in the District Court. The provisions of this Code as to trials in the District Court, are applicable to trials on appeal in the District Court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the District Court may order the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent. of the judgment appealed from. Judgments rendered in the District Court on appeal shall have the same force and effect, and may be enforced in the same manner, as judgments in actions commenced in the District Court.

Sec. 1125. No appeal shall be dismissed for insufficiency of the undertaking thereon, or for any defect or irregularity therein, if a good and sufficient undertaking be filed in the District Court at or before the hearing of the motion to dismiss the appeal, which undertaking must be approved by the district judge.

TITLE XIV.

MISCELLANEOUS PROVISIONS.

Chapter I. *Proceedings Against Joint Debtors.*
" II. *Offer of the Defendant to Compromise.*
" III. *Inspection of Writings.*
" IV. *Motions and Orders.*
" V. *Notices, and Filing, and Service of Papers.*
" VI. *Costs.*
" VII. *General Provisions.*

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

Section 1128. Parties not summoned on action on joint contract may be summoned after judgment.
" *1129. Summons in that case, what to contain, and how served.*
" *1130. Affidavit to accompany summons.*
" *1131. Answer, when filed and what it may contain.*
" *1132. What constitutes the pleadings in the case.*
" *1133. Issues, how tried. Verdict, what to be.*
" *1134. Joint debtor may compromise.*
" *1135. Effect of discharge of debtor. Contribution.*

Sec. 1128. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding, as provided in Section 356, those who are not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

Sec. 1129. The summons, as provided in the last section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same time as the original summons. It is not necessary to file a new complaint.

Sec. 1130. The summons must be accompanied by an affidavit of the plaintiff, his agent, representative or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

Sec. 1131. Upon such summons, the defendant may answer within the time specified therein, denying the judgment or setting up any defence which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the Statute of Limitations.

Sec. 1132. If the defendant, in his answer, deny the judgment, or set up any defence which may have arisen subsequently, the summons with the affidavit annexed, and the answer, constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, constitute such written allegations.

Sec. 1133. The issues formed may be tried as in other cases, but when the defendant denies in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

Sec. 1134. Any joint debtor including a partner may compromise with a creditor, and a discharge to him by such creditor, is as effectual as if made to all debtors, but such discharge does not relieve the other joint debtors. Any creditor can release a judgment in his favor against any one or more joint debtors, and such release does not discharge the others.

Sec. 1135. The discharge of such joint debtor operates as a payment to the creditor equal to the proportionate interest of the debtor discharged. But the discharge of such debtor does not prevent his co-debtors from enforcing the right of contribution in case they are compelled to pay the whole of the debt.

CHAPTER II.

OFFER OF THE DEFENDANT TO COMPROMISE.

Section 1136. Proceedings on offer of the defendant to compromise after suit brought.

Sec. 1136. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

CHAPTER III.

INSPECTION OF WRITINGS.

Section 1137. A party may demand inspection and copy of a book, paper, etc.

Sec. 1137. Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession or under his control, containing evidence relating to the merits of the action, or the defènce therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, documents, or papers, when he is examined as a witness.

CHAPTER IV.

MOTIONS AND ORDERS.

Section 1139. Order and motion defined.
" *1140. Motions and orders, where made.*
" *1141. Notice of motion, at what time to be given.*
" *1142. Transfer of motions and order to show cause.*
" *1143. Order made out of court, etc.*
" *1144. Order for payment of money, how enforced.*

Sec. 1139. Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

Sec. 1140. Motions must be made in the county in which the action is brought, or in any adjoining county in the same district. In case of the absence of the judge of the district from his district, such motion may be made before the judge of any adjoining district. Orders made out of court may be made by the judge of the court in any part of the State.

Sec. 1141. When a written notice of a motion is necessary, it must be given five days before the appointed time for the hearing, if both parties reside in the county where the court is held, otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge thereof, may prescribe a shorter time.

Sec. 1142. When a notice of motion is given, or an order to show cause is made returnable, before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge.

Sec. 1143. An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it; or it may be vacated or modified on notice, in the manner in which other motions are made.

Sec. 1144. Whenever an order for the payment of a sum of money is made by a court or judge, pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment.

CHAPTER V.

NOTICES AND FILING AND SERVICE OF PAPERS.

Section 1147. Notices and papers, how served.
" *1148. When and how served.*
" *1149. Service by mail, when.*
" *1150. Service by mail, how.*

Section 1151. Appearance. Notices after appearance.
" *1152. Service on non-residents. Where a party has an attorney, service shall be on such attorney.*
" *1153. Preceding provisions not to apply to proceeding to bring party into contempt.*
" *1154. Service by telegraph.*

Sec. 1147. Notices must be in writing, and notices and other papers may be served upon the party or attorney in the manner prescribed in this Chapter, when not otherwise provided by this Code.

Sec. 1148. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other paper with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the postoffice, directed to such attorney.

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the afternoon, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelope, into the postoffice, directed to such party.

Sec. 1149. Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail.

Sec. 1150. In case of service by mail, the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address. The service in any case is deemed complete at the end of forty days from the date of its deposit in the postoffice.

Sec. 1151. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him, or has such appearance entered in open court. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail.

Sec. 1152. When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, or writs, and other process issued in the suit, and of papers to bring him into contempt.

Sec. 1153. The foregoing provisions of this Chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

Sec. 1154. Any summons, writ, or order, in any civil action or proceeding, and all other papers requiring service, may be transmitted by telegraph or telephone for service in any place, and the telegraphic or telephonic copy of such writ or order, or paper, so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect, in all respects as the original thereof might be delivered to him; and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph or telephone office from which it is sent. In sending it, either the original or certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph or telephone bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph or telephone a description of the seal, or any words or device thereon, but the same may be expressed in the telegraphic or telephonic copy by the letters "L. S." or by the word "seal."

CHAPTER VI.

COSTS.

Section 1160. Compensation of attorneys. Costs to parties.
" 1161. When allowed, of course, to the plaintiff.
" 1162. Defendant's costs must be allowed, of course, in certain cases.
" 1163. Costs, when in the discretion of the court.
" 1164. When the several defendants are not united in interest, costs may be severed.
" 1165. Costs of appeal discretionary with the court, in certain cases, and when.

Section 1166. Referee's fees.
" *1167. Continuance, costs may be imposed as condition of.*
" *1168. Costs when a tender is made before suit brought.*
" *1169. Costs in action by or against an administrator, etc.*
" *1170. Costs in a review other than by appeal.*
" *1171. Costs of demurrer or motion.*
" *1172. Counsel fees on foreclosure of mortgage.*
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" *1175. Attorney's fees need not be included in cost bill.*
" *1176. What are costs and disbursements.*
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" *1178. No cost bill in justice court.*
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" *1181. Non-resident plaintiff.*
" *1182. If security not given, action dismissed.*
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" *1184. State, etc., need not pay in advance.*
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" *1186. Clerk or sheriff may have execution for costs.*
" *1187. Officer's fees must be itemized.*
" *1188. Costs when State a party.*
" *1189. Costs when county a party.*

Sec. 1160. The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursemrnts, as hereinafter provided.

Sec. 1161. Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property or damages thereto.

2. In an action to recover the possession of personal property, where the value of the property exceeds fifty dollars; such value shall be determined by the jury, court or referee by whom the action is tried.

3. In an action for the recovery of money or damages, exclusive of interest, when plaintiff recovers over fifty dollars.

4. In a special proceeding.

5. In an action which involves the title or possession or right of possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or quo warranto proceedings.

6. In an action to foreclose a lien or pledge, or to prevent or abate a nuisance, or for an injunction.

Sec. 1162. Costs must be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in the next preceding section, and in special proceedings.

Sec. 1163. In other actions than those above mentioned, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court; but no costs can be allowed in an action for the recovery of money or damages when the plaintiff fails to recover more than fifty dollars, nor in an action to recover the possession of personal property, when the value of the property is not more than fifty dollars.

Sec. 1164. When there are several defendants in the actions mentioned in Section 1161, not united in interest, and making separate defences by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

Sec. 1165. In the following cases, the costs of appeal are in the discretion of the court:

1. When a new trial is ordered.
2. When a judgment is modified.

In all other cases the successful party shall recover from the other party his costs.

Sec. 1166. The fees of referees are eight dollars to each for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed.

Sec. 1167. When an application is made to the court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

Sec. 1168. When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action, he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

Sec. 1169. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs may be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs must by the judgment be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defence.

Sec. 1170. When the decision of a court inferior of jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

Sec. 1171. In all cases where a demurrer or motion is sustained or overruled, the losing party must pay to the other ten dollars as costs. If a demurrer or motion be withdrawn before the hearing, it shall be deemed overruled.

Sec. 1172. In an action to foreclose a mortgage or pledge, the court must allow as a part of the costs a reasonable attorney's fee, which shall be fixed by the court, any stipulation in the mortgage or any agreement between the parties to the contrary notwithstanding.

Sec. 1173. In an action to foreclose a mechanic's lien under the provisions of this Code, the court must allow as costs the money paid for filing and recording the lien, and a reasonable attorney's fee in the District and Supreme Courts, and such costs and attorney's fees must be allowed to each claimant whose lien is established, whether a plaintiff or defendant, whether there is one action or several, or the actions have been consolidated.

Sec. 1174. In an action to establish a claim for salary or wages under the provisions of Chapter III., Title IV., Part III., of this Code, the court must allow as costs a reasonable attorney's fee to each claimant who establishes his claim as provided in Section 1343, of this Code.

Sec. 1175. The attorney's fees mentioned in the next three preceding sections need not be included in the cost bill if they are made a part of the judgment.

Sec. 1176. A party to whom costs are awarded in an action is entitled to include in his bill of costs, his necessary disbursements as follows: The legal fees of witnesses, including mileage, of referees and other officers; the expenses of taking depositions; the legal fees for publication when publication is directed; the legal fees paid for filing and recording papers and certified copies thereof necessarily used in the action or on the trial; the legal fees paid stenographers for per diem or for copies; the reasonable expenses of printing papers for a hearing when required by a rule of court; the reasonable expenses of making transcript for the Supreme Court; the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and such other reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of law.

Sec. 1177. The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee—or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made—a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed, may, within five days after notice of filing of the bill of costs, file and serve a notice of a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers.

Sec. 1178. In a justice's or police court no cost bill need be filed but the justice or judge must tax the same, and make an itemized statement of all the costs incurred by each party, in his docket. In such courts the fees paid to jurors must be taxed against the unsuccessful party.

Sec. 1179. Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by Section 1177, and thereafter he may have an execution therefor as upon a judgment.

Sec. 1180. The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank, left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment.

Sec. 1181. When the plaintiff in an action resides out of the State, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

Sec. 1182. After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

Sec. 1183. Any person may commence and prosecute an action in any of the courts of this State who will file an affidavit stating that he has a good cause of action, that he is unable to pay the costs, or procure security to secure the same;

then it is hereby made the duty of the officers of the courts to issue all writs and serve the same and perform all services in the action, without demanding or receiving their fees in advance.

Sec. 1184. The State or a county, or any subdivision thereof, or any officer when prosecuting or defending an action on behalf of the State or county, or subdivision thereof, is not required to pay or deposit any fee or amount to or with any officer during the prosecution or defence of an action. No officer so prosecuting or defending shall be taxed with costs or damages, but such costs or damages, if any, shall be taxed to the State or county, as the case may be.

Sec. 1185. Each party to a civil action is required to pay the fees fixed by law for the performance of any service or duty by any officer of such court, at the instance of such party at the time such service is rendered, except in the case hereinbefore mentioned; and no such officer is required to perform such service or duty unless the fees fixed therefor are, on demand, first paid or tendered.

Sec. 1186. In all cases, after final judgment, the clerk or sheriff may make out a bill of costs against the party incurring them, and if not paid within twenty days after demand, execution may issue in the name of the parties to the action for the benefit of the clerk or sheriff.

Sec. 1187. No fees of any officer shall be payable until an itemized account of the same, signed by the officer, shall be presented to the person liable therefor.

Sec. 1188. When the State is a party, and costs are awarded against it, they must be paid out of the State treasury.

Sec. 1189. When a county is a party, and costs are awarded against it, they must be paid out of the county treasury.

CHAPTER VII.

GENERAL PROVISIONS.

Section 1195. Scire facias abolished.
" *1196. Lost papers, how supplied.*
" *1197. Papers without the title of the action, or with defective title, may be valid.*
" *1198. Successive actions on the same contract, etc.*
" *1199. Consolidation of several actions into one.*
" *1200. Actions, when deemed pending.*
" *1201. The clerk must keep a register of actions.*
" *1202. The time within which an act is to be done may be extended.*
" *1203. Actions against a sheriff for official acts.*
" *1204. Undertaking mentioned in this Code, requisites of.*
" *1205. State not required to give bonds when State is a party.*

Section 1206. Surety on appeal substituted to rights of judgment creditor.
" *1207. Deposit instead of undertaking.*
" *1208. No charge for copies.*

Sec. 1195. The writ scire facias is abolished.

Sec. 1196. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

Sec. 1197. An affidavit, notice or other paper, without the title of the action or proceeding in which it is made or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

Sec. 1198. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

Sec. 1199. Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

Sec. 1200. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

Sec. 1201. The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

Sec. 1202. When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this Code may be extended, upon good cause shown by the court in which the action is pending, or a judge thereof; but such extension shall not exceed thirty days without the consent of the adverse party.

Sec. 1203. If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties, and the court may on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

Sec. 1204. In all cases where an undertaking with sureties is required by the provisions of this Code, the officer taking the same must require the sureties to accompany it with an affidavit that they are residents and householders or freeholders within the State, and are each worth the sum specified in the undertaking over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.

Sec. 1205. In any civil action or proceeding wherein the State or county or a municipal corporation, or any other officer in his official capacity on behalf of the State, a county, city, or town, is a party plaintiff or defendant, no bond, undertaking, or security can be required of the State, county, municipal corporation or town, or any officer thereof; but on complying with the other provisions of this Code the State, county, municipal corpration or town, or any officer thereof acting in his official capacity has the same rights, remedies and benefits, as if the bond, undertaking or security was given and approved as required by this Code.

The board of trustees of any school district is entitled to the benefit of this section.

Sec. 1206. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same.

Sec. 1207. In all cases where an undertaking or bond with sureties is required by the provisions of this Code, the plaintiff or defendant may deposit with the clerk of the court or justice of the peace or police judge, as the case may be, a sum of money equal to the amount required by the undertaking or bond, which shall be taken as security in the place thereof.

At any time such deposit may be withdrawn by the party making it, upon giving the undertaking with sufficient sureties as required by law, approved by the clerk or justice or judge, upon notice to the adverse party or his attorney, who may object to the sufficiency of the sureties in the same manner as though the undertaking were filed in the first instance.

Sec. 1208. In all cases where copies of pleadings, affidavits, or other papers are to be served, neither the sheriff nor clerk shall charge or receive a fee for making such copies when the same are furnished to such officer by the party to the action or his attorney.

PART III.

SPECIAL PROCEEDINGS OF A CIVIL NATURE.

Title I. Writs of Review, Mandate and Prohibition.
" *II. Contesting Elections.*
" *III. Summary Proceedings.*
" *IV. Enforcement of Liens.*
" *V. Contempt.*
" *VI. Voluntary Dissolution of Corporations.*
" *VII. Eminent Domain.*
" *VIII. Escheated Estates.*
" *IX. Change of Name.*
" *X. Arbitrations.*
" *XI. Sole Trader.*
" *XII. Proceedings in Probate.*
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PRELIMINARY PROVISIONS.

Section 1215. Parties, how designated.
" *1216. Judgment and order same meaning as in civil actions.*

Sec. 1215. The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant.

Sec. 1216. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

TITLE I.

WRITS OF REVIEW, MANDATE AND PROHIBITION.

Chapter I. Writ of Review.
" *II. Writ of Mandate.*
" *III. Writ of Prohibition.*
" *IV. Writs of Review, Mandate and Prohibition May Issue and be Heard at Chambers.*
" *V. Rules of Practice and Appeals.*

CHAPTER I.

WRIT OF REVIEW.

Section 1218. Writ of review defined.
" *1219. When and by what courts granted.*
" *1220. Application for, how made.*
" *1221. The writ to be directed to the inferior tribunal, etc.*
" *1222. Contents of the writ.*

Section 1223. Proceedings in inferior court may be stayed, or not.
" *1224. Service of the writ.*
" *1225. The review under the writ, extent of.*
" *1226. A defective return of the writ may be perfected. Hearing and judgment.*
" *1227. Copy of judgment must be sent to the inferior tribunal.*
" *1228. Judgment rolls.*

Sec. 1218. The writ of certiorari may be denominated the writ of review.

Sec. 1219. A writ of review may be granted by the Supreme Court (and in proceedings for contempt, in the District Court, by any justice of the Supreme Court,) or by the District Court or any judge thereof, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

Sec. 1220. The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Sec. 1221. The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

Sec. 1222. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed.

Sec. 1223. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the court or judge; but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

Sec. 1224. The writ must be served in the manner as a summons in civil action, except when otherwise expressly directed by the court or judge.

Sec. 1225. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer, has regularly pursued the authority of such tribunal, board or officer.

Sec. 1226. If the return of the writ be defective, the court or judge may order a further return to be made. When a full return has been made, the court or judge must hear the parties or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling or modifying the proceedings below.

Sec. 1227. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board or officer having the custody of the record or proceeding certified upon.

Sec. 1228. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

CHAPTER II.

WRIT OF MANDATE.

Section 1232. Mandate defined.
" *1233. When and by what court issued.*
" *1234. Writ, when and upon what to issue.*
" *1235. Must be either alternative or peremptory. Substance.*
" *1236. If the application be without notice, the alternative writ may issue; otherwise, the peremptory. Notice and default.*
" *1237. The adverse party may answer under oath.*
" *1238. If an essential question of fact is raised, the court may order a jury trial.*
" *1239. The applicant may demur to the answer or contradict it by proof.*
" *1240. Motion for new trial, where made.*
" *1241. The clerk must transmit the verdict to the court where the motion is pending, after which the hearing shall be had on motion.*
" *1242. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court.*
" *1243. If the applicant succeed, he may have damages, costs, and a peremptory mandate.*
" *1244. Service of the writ.*
" *1245. Penalty for disobedience to the writ.*

Sec. 1232. The writ of mandamus may be denominated a writ of mandate.

Sec. 1233. It may be issued by the Supreme Court or the District Court, or any judge of the District court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Sec. 1234. The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested.

Sec. 1235. The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return day inserted.

Sec. 1236. When an application to the court or judge is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, must be at least ten days, or a shorter time, in the discretion of the court or judge. The writ cannot be granted by default. The case must be heard by the court or judge, whether the adverse party appear or not.

Sec. 1237. On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

Sec. 1238. If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court or judge may, in its or his discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had. The question to be tried must be distinctly stated in the order for trial. If the proceeding is in the District Court or before a district judge, the trial must take place as in other cases.

If a jury be required in the Supreme Court, a jury must be drawn and selected from the jury boxes of the county in which the seat of government is located, and the clerk of the District Court of said county must place such boxes in the custody of the clerk of the Supreme Court for that purpose. The conduct of the trial shall be the same as in the District Court, and the clerk of the Supreme Court shall have the same authority to issue process, enter orders and judgments as the district clerk has in like cases.

The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

Sec. 1239. On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may contradict it by proof, either in direct denial or by way of avoidance.

Sec. 1240. The motion for a new trial must be made in the court in which the issue of fact is tried.

Sec. 1241. If no notice of a motion for a new trial be given, or, if given, the motion be denied, the argument must proceed at any time the court or judge may direct.

Sec. 1242. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial right of the parties, the court or judge must proceed to hear or fix a day for hearing the argument of the case.

Sec. 1243. If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.

Sec. 1244. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court or judge. Service upon a majority of the members of any board or body, is service upon the board or body, whether at the time of the service the board or body was in session or not.

Sec. 1245. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board or person, if it appear to the court or judge that any member of such tribunal, corporation or board, or person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

CHAPTER III.

WRIT OF PROHIBITION.

Section 1248. Prohibition defined.
" 1249. Where and when issued.
" 1250. Writ may be alternative or peremptory. Form of.
" 1251. Certain provisions of the preceding Chapter applicable.

Sec. 1248. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, whether exercising functions judicicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

Sec. 1249. The same may be issued by the Supreme Court or the District Court, or any district judge, to any inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested.

Sec. 1250. The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court or judge from which it is issued, and to show cause before such court or judge, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted, and a return day inserted.

Sec. 1251. The provisions of the preceding Chapter, except of the four first sections thereof, apply to this proceeding.

CHAPTER IV.

WRITS OF REVIEW, MANDATE, AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS.

Section 1253. Writs of review, mandate, and prohibition may issue and be heard at chambers.

Sec. 1253. Writs of review, mandate, and prohibition issued by the Supreme Court, or by a District Court, or district judge, may, in the discretion of the court issuing the writ, be made returnable and a hearing thereon be heard at any time.

CHAPTER V.

RULES OF PRACTICE, AND APPEALS.

Section 1255. Certain provisions of Part II. applicable.
" 1256. Same.

Sec. 1255. Except as otherwise provided in this Title the provisions of Part II., of this Code, are applicable to, and constitute the rules of practice in the proceedings mentioned in this Title.

Sec. 1256. The provisions of Part II., of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this Title, apply to the proceedings mentioned in this Title.

TITLE II.

CONTESTING CERTAIN ELECTIONS.

Section 1260. Who may contest and ground of contest.
" *1261. Irregularity and improper conduct of judges, when to annul elections.*
" *1262. When not to.*
" *1263. Illegal votes, when not to vitiate election.*
" *1264. Proceedings on contest.*
" *1265. Statement of cause of contest. When based on reception of illegal votes, contestant to deliver to respondent a list of votes claimed to be illegal.*
" *1266. Statement of cause of contest; want of form not to vitiate.*
" *1267. Judge to hold special term for trial of contest.*
" *1268. Clerk to issue citation to respondent.*
" *1269. Witnesses, attendance of, how enforced.*
" *1270. Power of court. Adjournment of court.*
" *1271. Rules to govern court in trial of contest.*
" *1272. Court may declare who was elected.*
" *1273. Costs.*
" *1274. Appeal.*
" *1275. When election void and office vacant.*

Sec. 1260. Any elector of a county, town or city, or of any political subdivision of either, may contest the right of any person declared to be elected to an office to be exercised therein, for any of the following causes:

1. For malconduct on the part of the board of judges, or any member thereof.

2. When the person whose right to the office is contested was not, at the time of the election, eligible to such office.

3. When the person whose right is contested has given to any elector or inspector, judge or clerk of the election, any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offence against the elective franchise, defined in Title IV., Part I., of the Penal Code.

4. On account of illegal votes.

Sec. 1261. No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes.

Sec. 1262. When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of the board of judges of any election district or precinct, or any member thereof, the election cannot be annulled and set aside upon any proof thereof, unless the rejection of the vote of such district or precinct would change the result as to such office in the remaining vote of the county.

Sec. 1263. Nothing in the fourth ground of contest, specified in Section 1260, is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.

Sec. 1264. When an elector contests the right of any person declared elected to such office, he must, within twenty days after the canvassers have made their return of the election, file with the clerk of the District Court of the county in which the contest arises a written statement, setting forth specifically:

1. The name of the party contesting such election, and that he is an elector of the district, county or township, as the case may be, in which such election was held.
2. The name of the person whose right to the office is contested.
3. The office.
4. The particular grounds of such contest.

Which statement must be verified by the affidavit of the contesting party that the matters and things therein contained are true.

Sec. 1265. When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that in one or more specified voting precincts illegal votes were given to the person whose election is contested, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony can be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on such trial; and no testimony can be received of any illegal votes except such as are specified in such list.

Sec. 1266. No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainity as will advise the defendant of the particular proceeding or cause for which such election is contested.

Sec. 1267. Upon the statement being filed, the clerk must inform the District Court or judge of the county thereof, which shall thereupon order a special session or term of such court to be held at the court room, on some day to be named by it, not less than ten nor more than twenty days from the date of such order, to hear and determine such contested election.

Sec. 1268. The clerk shall thereupon issue a citation for the person, whose right to the office is contested, to appear at the time and place specified in the order, which citation must be delivered to the sheriff, and served either upon the party in person, or if he cannot be found, by leaving a copy thereof at the house where he last resided, at least five days before the time so specified.

Sec. 1269. The clerk must issue subpoenas for witnesses at the request of either party, which must be served as other subpoenas; and the District Court shall have full power to issue attachments to compel attendance of witnesses who have been subpoenaed to attend.

Sec. 1270. The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended, and may also continue the trial, before its commencement, for any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the cost of the party applying for such continuance.

Sec. 1271. The court must be governed, in the trial and determination of such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable; and may dismiss the proceedings if the statement of the cause or causes of the contest is insufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election.

Sec. 1272. If in any such case it appears that another person than the one returned has the highest number of legal votes, the court must declare such person elected.

Sec. 1273. If the proceedings are dismissed for insufficiency, or want of prosecution, or the election is by the court confirmed, judgment must be rendered against the party contesting such election, for costs, in favor of the party whose election was contested; but if the election is annulled or set aside, judgment for costs must be rendered against the party whose election was contested, in favor of the party contesting the same. Primarily, each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in other cases.

Sec. 1274. Either party, aggrieved by the judgment of the court may appeal therefrom to the Supreme Court, as in other cases of appeal thereto from the District Court, but such appea must not stay execution or proceedings, except execution for costs.

Sec. 1275. Whenever an election is annulled or set aside by the judgment of the District Court, and no appeal has been taken within ten days thereafter, the commission, if any has issued, is void, and the office vacant.

TITLE III.

SUMMARY PROCEEDINGS.

Chapter I. Confession of Judgment Without Action.
" II. Submitting a Controversy Without Action.
" III. Discharge of Persons Imprisoned on Civil Process.
" IV. Summary Proceedings for Obtaining Possession of Real Property in Certain Cases.

CHAPTER I.

CONFESSION OF JUDGMENT WITHOUT ACTION.

Section 1280. Judgment may be confessed for debt due or contingent liability.
" 1281. Statement in writing and for thereof.
" 1282. Filing statement and entering judgment.
" 1283. How, in justices' courts.

Sec. 1280. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this Chapter. Such judgment may be entered in any court having jurisdiction for like amounts:

Sec. 1281. A statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum.

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

Sec. 1282. The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with ten dollars, costs. The statement and affidavit, with the judgment indorsed thereon, becomes the judgment roll.

Sec. 1283. In a justice's court, where the court has authority to enter the judgment, the statement may be filed with the justice, who may thereupon enter in his docket a judgment of his court for the amount confessed, with five dollars, costs in the District Court and three dollars in the justice court. If a transcript of such judgment be filed with the clerk, a copy of the statement must be filed with it.

CHAPTER II.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

Section 1285. Controversies, how submitted without action.
" 1286. Judgment on, as in other cases, but without costs prior to notice of trial.
" 1287. Judgment may be enforced or appealed from as in an action.

Sec. 1285. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith to determine the rights of the parties. The court must thereupon hear and determine the case and render judgment thereon as if an action were depending.

Sec. 1286. Judgment must be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission and a copy of the judgment constitute the judgment roll.

Sec. 1287. The judgment may be enforced in the same manner as if it had been rendered in an action and is in the same manner subject to appeal.

CHAPTER III.

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.

Section 1290. Persons confined may be discharged.
" 1291. Notice of application.
" 1292. Service of notice.
" 1293. Examination before judge.
" 1294. Interrogatories may be in writing.
" 1295. Oath to be administered.
" 1296. Order of discharge.
" 1297. If not discharged, prisoner may again apply, when.
" 1298. Discharge final.
" 1299. Judgment remains in force.

Section 1300. Plaintiff may order discharge of the prisoner, who shall not thereafter be liable to imprisonment for the same cause of action.

" 1301. Plaintiff to advance funds for support of prisoner.

Sec. 1290. Any person confined in jail on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions of this Chapter specified.

Sec. 1291. Such person must cause a notice in writing to be given to the plaintiff, his agent or attorney, that at a certain time and place he will apply to a judge of the District Court of the county in which such person may be confined, for the purpose of obtaining a discharge from his imprisonment.

Sec. 1292. Such notice must be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application.

If the plaintiff be not a resident of the county, and have no agent or attorney in the county, no such notice will be served.

Sec. 1293. At the time and place specified in the notice, such person must be taken before the judge, who must examine him under oath concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal or pertinent evidence that may be produced by the debtor or the creditor.

Sec. 1294. The plaintiff in the action may, upon such examination, propose to the prisoner any such interrogatories pertinent to the inquiry; and they must, if required by him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner.

Sec. 1295. If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath, to-wit: "I, ————, do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to hinder, delay, or defraud my creditors: So help me God."

Sec. 1296. After administering the oath, the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause.

Sec. 1297. If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings must thereupon be had.

Sec. 1298. The prisoner, after being so discharged, is forever exempt from arrest or imprisonment for the same debt, unless he be convicted of having willfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

Sec. 1299. The judgment against any prisoner who is discharged remains in full force against any estate which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed.

Sec. 1300. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

Sec. 1301. Whenever a prisoner is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment, and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody; and such discharge has the same effect as if made by order of the creditor.

CHAPTER IV.

SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY IN CERTAIN CASES.

Section 1305. Forcible entry defined.
" *1306. Forcible detainer defined.*
" *1307. Unlawful detainer defined.*
" *1308. Service of notice.*
" *1309. What courts have jurisdiction.*
" *1310. Parties defendant.*
" *1311. Parties generally.*
" *1312. Complaint. Judge to fix day for appearance of defendant and summons.*
" *1313. Summons, form and service of.*
" *1314. Judgment by default.*
" *1315. Defendant may appear, etc.*
" *1316. Trial by jury.*
" *1317. Showing required of plaintiff in forcible entry or detainer. Of defendant.*
" *1318. Complaint must be amended in certain cases.*
" *1319. Verdict and judgment.*
" *1320. Verification of complaint and answer.*
" *1321. Appeal.*
" *1322. Rules of practice.*
" *1323. Appeals, how taken, etc.*
" *1324. Relief against forfeiture of lease.*

Sec. 1305. Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property or mining claim; or,

2. Who, after entering peaceably upon real property or mining claim, turns out by force, threats or menacing conduct the party in possession.

Sec. 1306. Every person is guilty of a forcible detainer who either:

1. By force or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property or mining claim, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night time, or during the absence of the occupant of any lands or mining claim, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days refuses to surrender the same to such former occupant.

The occupant of real property or mining claim, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisputed possession of such lands.

Sec. 1307. A tenant of real property or mining claim, for a term less than life, is guilty of unlawful detainer:

1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of the landlord, or the successor in estate of his landlord, if any there be; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. Where he continues in possession, in person or by subtenant, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him, and if there be a sub-tenant in actual occupation of the premises, also upon such sub-tenant. Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord or the successor in estate of his landlord, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the

period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. When he continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sub-let, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there be a sub-tenant in actual occupation of the premises, also upon such subtenant. Within three days after the serving of the notice, the tenant, or any subtenantin actual ocoupation of the premises, or any mortgagee of the term, or other person interested in its continuance, mayperform the conditions or covenants of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture. If the covenants and conditions of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant demanding the performance of the violated covenant or conditions of the lease. A tenant may take proceedings, similar to those prescribed in this Chapter, to obtain possession of the premises let to an under-tenant, in case of his unlawful detention of the premises under-let to him.

4. Any tenant or sub-tenant, assigning or sub-letting, or committing waste upon the demised premises, contrary to the covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall upon service of three days' notice to quit, upon the person or persons in possession, be entitled to restitution of possession of such demised premises, under the provisions of this Chapter.

Sec. 1308. The notices required by the preceding section may be served, either:

1. By delivering a copy to the tenant personally; or,

2. If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence; or,

3. If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a sub-tenant may be made in the same manner.

Sec. 1309. The District Court of the county in which the property, or some part of it, is situated, shall have jurisdiction of proceedings under this Chapter; *Provided*, That justices' courts, within their respective towns, townships or cities, shall have concurrent jurisdiction.

Sec. 1310. No person other than the tenant of the premises and sub-tenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be non-suited for the non-joinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him. In case a defendant has become a sub-tenant of the premises in controversy, after the service of the notice provided for by Part II., of Section 1307, ot this Code, upon the tenant of the premises, the fact that such notice was not served on each sub-tenant, shall constitute no defence to the action. In case a married woman be a tenant, or a sub-tenant, her coverture shall constitue no defence; but in case her husband be not joined, or unless she has separate property, an execution issued upon a personal judgment against her can only be enforced against property on the premises at the commencement of the action, or against her separate property. All persons who enter the premises under the tenant, after the commencement of the action, shall be bound by the judgment the same as if he or they had been made party to the action.

Sec. 1311. Except as provided in the preceding section, the provisions of Part II., of this Code, relating to parties to civil actions, are applicable to this proceeding.

Sec. 1312. The plaintiff, in his complaint, which must be in writing, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force or violence, which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint, a summons must be issued thereon as in other cases, returnable at a date designated therein, which shall not be less than four days nor more than twelve days from its date. The summons must be served personally upon the defendants, if within the State; if not within the State, in the same manner as notices are required to be served in Section 1308. The complaint need not be served.

Sec. 1313. The summons must state the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day, and must notify the defendant to appear and answer within the time designated, or that the relief sought will be taken against him. The summons must be directed to the defendant, and be served at least four days before the return day designated therein, and must be served and returned in the same manner as summons in civil actions is served and returned. Upon the return of any summons issued under this Chapter, where the same has not, for any reason, been served or not served in time, the plaintiff may have a new summons issued, the same as if no previous summons had been issued.

Sec. 1314. If, at the time appointed, the defendant does not appear and defend, the court must enter his default, and enter judgment in favor of the plaintiff, as prayed for in the complaint.

Sec. 1315. On or before the day fixed for his appearance, the defendant may appear and answer or demur.

Sec. 1316. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending.

Sec. 1317. On the trial of any proceedings for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or, was entitled to the possession at the time of the forcible detainer. The defendant may show in his defence, that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined, and such showing is a bar to the proceedings.

Sec. 1318. When, upon the trial of any proceeding under this Chapter, it appears from the evidence that the defendant has been guilty of either forcibly entry or a forcible or unlawful detainer, and other than the offence charged in the complaint, the judge must order that such complaint be forthwith amended to conform with such proof; such amendment must be made without any imposition of terms. No continuance shall be permitted on account of such amendment, unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor.

Sec. 1319. If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant, guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due. When the proceeding is for an unlawful detainer after default in the payment of the rent, and the lease or agreement under which the rent is payable, has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any sub-tenant, or any mortgagee of the term, or other party nterested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon and the amount of damages found by the jury or the court for the unlawful detainer, and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment, as here provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

Sec. 1320. The complaint and answer must be verified. If new matter be set up in the answer it is deemed denied.

Sec. 1321. An appeal may be taken by plaintiff or defendant as in other cases.

Sec. 1322. Except as otherwise provided in this Chapter, provisions of Part II., of this Code, are applicable to, and constitute the rules of practice mentioned in this Chapter.

Sec. 1323. The provisions of Part II., of this Code, relative to new trials and appeals, except as in so far as they are inconsistent with the provisions of this Chapter, apply to the proceedings mentioned in this Chapter.

Sec. 1324. The court may relieve a tenant against a forfeiture of a lease and restore him to his former estate in case of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in Section 1319. The application may be made by a tenant or sub-tenant, or mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made.

TITLE IV.

ENFORCEMENT OF LIENS.

Chapter I. Liens in General.
" II. Liens of mechanics and others upon real property.
" III. Certain liens for salaries and wages.

CHAPTER I.

LIENS IN GENERAL.

Section 1326. Definition of lien.

Sec. 1326. A lien is a charge imposed upon specific property by which it is made security for the performance of an act.

CHAPTER II.

LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY.

Section 1328. Who entitled to lien.
" 1329. How lien perfected.
" 1330. Duty of county clerk.
" 1331. What property affected.
" 1332. Lease-hold interest, how affected.
" 1333. Priority of lien over mortgage.
" 1334. Part II., of this Code, applicable, relative to practice.
" 1335. Same relative to new trials.
" 1336. All persons interested may be made parties.
" 1337. Limitations.
" 1338. Who deemed owners.
" 1339. Satisfaction of lien.

Sec. 1328. Every mechanic, miner, machinist, architect, foreman, engineer, builder, lumberman, artisan, workman, laborer, and any person performing any work and labor upon, or furnishing any material, machinery or fixture for any building, structure, bridge, flume, canal, ditch, acqueduct, mining claim, quartz lode, tunnel, city or town lot, farm, ranch, fence, railroad, telegraph, telephone, electric light, gas or water works or plant, or any improvements upon complying with the provisions of this Chapter, for his work or labor done, or material, machinery or fixtures furnished, has a lien upon the property upon which the work or labor is done, or material furnished.

Sec. 1329. Every person wishing to avail himself of the benefits of this Chapter must file with the county clerk of the county in which the property or premises mentioned in the preceding section is situated, and within forty-five days after the material or machinery aforesaid has been furnished, or the work or labor performed, a just and true account of the amount due to him, after allowing all credits and containing a correct description of the property to be charged with such lien, verified by affidavit, but any error or mistake in the amount or description does not affect the validity of the lien, if the property can be identified by the description, which paper containing the account, description and affidavit, is deemed the lien.

Sec. 1330. The county clerk must indorse upon every lien the day of its filing, and make an abstract thereof in a book by him to be kept for that purpose, and properly indexed, containing the date of the filing, the name of the person holding the lien, the amount thereof, the name of the person against whose property the lien is filed and the description of the property to be charged with the same.

Sec. 1331. The lien given extends to the lot or land upon which any such building, improvements, or structure is situated, to the extent of one acre, if outside of any town or city, or within any town or city, then to the extent of the whole lot or lots upon which the same is situated, if the land belonged to the person who caused said building to be constructed, altered or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien; all liens for any work or labor done or materials furnished upon the same premises, which shall be filed within thirty days after the filing of the first lien on such premises, shall entitle the holders thereof to share equally *pro rata*, according to the amount of their respective liens in the proceeds arising from the sale of such premises upon the foreclosure of such liens. If, after the expiration of thirty days, other liens are filed against such premises, then all liens filed within sixty days after the filing of such subsequent lien are liens of the second class, and are prior and have precedence over any mortgage, incumbrance or other lien made subsequent to the commencement of work on any building, structure or other improvement.

Sec. 1332. When the interest in the land, building, structure or other improvement, is a lease-hold interest, the forfeiture of such lease does not forfeit or impair such liens so far as concerns the buildings, structures and improvements put thereon by the persons charged with such lien, but the same may be sold to satisfy said lien, and may be removed within twenty days after the sale thereof by the purchaser.

Sec. 1333. The liens attach to the buildings, structures or improvements for which they were furnished or the work was done in preference to any prior lien, incumbrance or mortgage upon the land upon which said buildings, structures or improvements are erected; and any person enforcing such lien may sell the same under execution and the purchaser may remove the property sold within a reasonable time thereafter.

Sec. 1334. Except as otherwise provided in this Chapter, the provisions of Part II., of this Code, are applicable to and constitute the rules of practice in the proceedings mentioned in this Chapter.

Sec. 1335. The provisions of Part II., of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this Chapter, apply to the proceedings mentioned in this Chapter.

Sec. 1336. All persons interested in the matter in controversy, or in property charged with the lien, or having liens thereon, may be made parties.

Sec. 1337. All actions under this Chapter must be commenced within twelve months from the filing of the lien.

Sec. 1338. Every person, including guardians of minors, married women, and any company, association or corporation not tenants or lessees, for whose use, benefit or enjoyment any property, building, structure or improvement mentioned in this Chapter is constructed, repaired or altered, is deemed the owner thereof for the purposes of this Chapter.

Sec. 1339. Whenever any indebtedness which is a lien upon any such real estate, structure, building or other improvement, is paid and satisfied, it is the duty of the creditors to acknowledge satisfaction thereof as in case of a mortgage; and if any creditor fail to acknowledge satisfaction, as aforesaid, he is liable to any person injured by such failure to the amount of such injury and the costs of action.

CHAPTER III.

CERTAIN LIENS FOR SALARIES AND WAGES.

Section 1343. Preferred creditors when assignment of property is made.
" *1344. Same against estates.*
" *1345. Same in cases of execution or attachment.*
" *1346. Service of notice.*
" *1347. Proceeding if claim disputed.*
" *1348. Original action cannot be dismissed.*
" *1349. Mortgages, etc., not affected.*

Sec. 1343. In all assignments of property made by any person to trustees or assignees on account of the inability of the person, at the time of the assignment, to pay his debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks, or the laborers employed by such person, to the amount of two hundred dollars each and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor.

Sec. 1344. In case of the death of any employer the wages of each miner, mechanic, salesman, clerk, servant and laborer for services rendered within sixty days next preceding the death of the employer, not exceeding two hundred dollars, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and must be paid before other claims against the estate of the deceased person.

Sec. 1345. In case of executions, attachments and writs of similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, or laborers who have claims against the defendant for labor done, may give notice of their claims and the amount thereof, sworn to by the person making the claim, to the parties plaintiff and defendant to the action in which such execution, attachment or other writ has been issued, and upon the officer executing the same. Service of notice herein required may be made upon the officer charged with the execution of such writ in one or more cases that may be pending against such person, who shall forthwith serve such notice and claim, by copy, upon the said parties, plaintiff and defendant, if found in the county where such action is pending, or upon their respective attorneys employed in such case or cases pending.

Sec. 1346. The officer serving said notice and claim shall forthwith, after such service of the same, make return thereof, showing such service, where and how made. Service may be made in any case at any time before the actual sale of the property levied upon in such pending action, and unless such claim is disputed by the debtor or a creditor or party plaintiff, such officer must pay such person out of the proceeds of the sale the amount he is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding two hundred dollars. If any or all of the claims so presented, and claiming preference under this Chapter, are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days after notice of such dispute is served upon such claimant, as provided for in the next section, for the recovery thereof; and the officer must retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim and costs until the final determination of such action; and in case judgment be had, the costs are a preferred claim, which may include a reasonable attorney's fee.

Sec. 1347. The debtor or creditor intending to dispute any claim presented under the provisions of the last section shall, within ten days after receiving notice of such claim, serve upon the claimant and officer holding such execution, attachment or other writ, a statement in writing, verified by the oath of the debtor or person disputing such claim for services, setting forth that no part of said claim, not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the sixty days next preceding the levy of the execution, attachment or other writ, as the case may be. If the claimant bring suit on a claim which is disputed in part only, and fail to recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him; and where such claimant fails to bring suit upon his claim, which is disputed in part only, he shall be deemed to have waived that portion of his claim disputed.

Sec. 1348. Persons having the preferred claims mentioned in this Chapter, are entitled to a lien upon the property attached or levied upon, and if said claims are not disputed, or if a judgment is recovered for the same, the officer must pay such claims out of the property, and the original action cannot be dismissed without the consent of the owners of such preferred claims.

Sec. 1349. Nothing in this Chapter shall be construed so as to affect any lien, incumbrance or mortgage held by any creditor of such employer prior to said sixty days.

TITLE V.

CONTEMPTS.

Section 1352. What acts or omissions are contempts.
“ *1353. Re-entry on property after eviction, when a contempt.*
“ *1354. A contempt committed in the presence of the court may be punished summarily. When not so committed, an affidavit or statement shall be made.*
“ *1355. A warrant of attachment may issue or a notice to show cause.*
“ *1356. Bail may be given by a person arrested under such warrant.*
“ *1357. Sheriff must, upon executing the warrant, arrest and detain the person until discharged.*
“ *1358. Bail bond, form and conditions of.*
“ *1359. Officer must return warrant and undertaking, if any.*
“ *1360. Hearing.*
“ *1361. Judgment and penalty, if guilty.*
“ *1362. If the contempt is the omission to perform any act, the person may be imprisoned until performance.*
“ *1363. If a party fail to appear, proceedings.*
“ *1364. Illness sufficient cause for non-appearance of party arrested. Confinement under arrest for contempt.*
“ *1365. Judgment and orders in such cases final.*

Sec. 1352. The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

2. A breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner or other person appointed or elected to perform a judicial or ministerial service.

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding.

5. Disobedience of any lawful judgment, order, or process of the court.

6. Assuming to be an officer, attorney or counsel of a court, and acting as such without authority.

7. Rescuing any person or property, in the custody of an officer by virtue of an order or process of such court.

8. Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from, the court where the action is on the calendar for trial.

9. Any other unlawful interference with the process or proceedings of a court.

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

12. Disobedience, by an inferior tribunal, magistrate or officer, of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders, or process of a judicial officer is also a contempt of the authority of such officer.

Sec. 1353. Every person dispossessed of or ejected from, or out of, any real property, by the judgment or process of any court of competent jurisdiction, and who, not having right so to do, re-enters into or upon, or takes possession of any such real property, or induces or procures any person not having a right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such processs issued. Upon conviction for such contempt, the court or justice of the peace must immediately issue an alias process, directed to the proper officer, and requiring him to restore the party entitled to the possession of such property, under the original judgment or process, to such possession.

Sec. 1354. When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officer.

Sec. 1355. When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause be granted, and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

Sec. 1356. Whenever a warrant of attachment is issued, pursuant to this Title, the court or judge must direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such indorsement.

Sec. 1357. Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

Sec. 1358. When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge thereupon; or they will pay, as may be directed, the sum specified in the warrant, or ordered by court or judge.

Sec. 1359. The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested by the return day specified therein.

Sec. 1360. When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time if necessary.

Sec. 1361. Upon the answer and evidence taken the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both.

Sec. 1362. When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he shall have performed it, and in that case the act must be specified in the warrant of commitment.

Sec. 1363. When the warrant of arrest has been returned served, if the person arrested does not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

Sec. 1364. Whenever, by the provisions of this Title, an officer is required to keep a person, arrested on a warrant of attachment, in custody, and to bring him before a court or judge, the inability from illness or otherwise, of the person to attend, is sufficient excuse for not bringing him up; and the officer must not confine a person arrested upon the warrant, in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

Sec. 1365. The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive, and there is no appeal; but the action of a District Court or judge can be reviewed on a writ of certiorari, by the Supreme Court or a judge thereof, and the action of a justice of the peace or other inferior court by the District Court or judge of the county in which such justice or judge of such inferior court resides.

TITLE VI.

VOLUNTARY DISSOLUTION OF CORPORATIONS.

Section 1367. Corporations, how dissolved.
" 1368. Application, what to contain.
" 1369. Application, how signed and verified.
" 1370. Filing application and publication of notice:
" 1371. Objections may be filed.
" 1372. Hearing of application.
" 1373. Judgment roll and appeals.

Sec. 1367. A corporation may be dissolved by the District

Court of the county where its principal place of business is situated, upon its voluntary application for that purpose.

Sec. 1368. The application must be in writing, and must set forth:

1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-thirds vote of all the stockholders or members.

2. That all claims and demands against the corporation have been satisfied and discharged.

Sec. 1369. The application must be signed by a majority of the board of trustees, directors or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action.

Sec. 1370. If the court is satisfied that the application is in conformity with this Title, the judge thereof must order it to be filed with the clerk, and that the clerk give not less than thirty nor more than fifty days' notice of the application, by publication in some newspaper published in the county; and if there are none such, then by advertisements posted up in three of the principal public places in the county.

Sec. 1371. At any time before the expiration of the time of publication, any person may file his objections to the application.

Sec. 1372. After the time of publication has expired, the court or judge may, upon five days' notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the application, and if all the statements made therein are shown to be true, must declare the corporation dissolved.

Sec. 1373. The application, notices, proof of publication, objections (if there be any), and declaration of dissolution, constitute the judgment roll; and from the judgment an appeal may be taken, as from other judgments of the District Court.

TITLE VII.

EMINENT DOMAIN.

Section 1375. Eminent domain defined.
" *1376. Purposes for which it may be exercised.*
" *1377. What estates in land may be acquired by condemnation.*
" *1378. Private property defined. Classes enumerated.*
" *1379. Facts necessary to be found before condemnation.*
" *1380. Parties may make location. May enter to make surveys.*
" *1381. Jurisdiction in District Court.*
" *1382. The complaint and its contents.*

Section 1383. Summons, what to contain. How issued and served.
" 1384. Who may defend. What the answer may show and how verified.
" 1385. Power of court to appoint commissioners, etc.
" 1386. Meeting of commissioners.
" 1387. The date with respect to which compensation shall be assessed, and the measure thereof.
" 1388. Report of commissioners.
" 1389. Appeal.
" 1390. New proceedings to cure defective title.
" 1391. Payment of damages.
" 1392. To whom paid.
" 1393. Final order of condemnation, what to contain; when filed, title vests.
" 1394. Putting plaintiff in possession.
" 1395. Payment of costs.
" 1396. Rules of practice.
" 1397. New trials and appeals.
" 1398. Private roads.
" 1399. Exceptions.

Sec. 1375. Eminent domain is the right of the State to take private property for public use. This right may be exercised in the manner provided in this Title.

Sec. 1376. Subject to the provisions of this Title, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States.

2. Public buildings and grounds for the use of the State, and all other public uses authorized by the Legislative Assembly of this State.

3. Public buildings and grounds for the use of any county, city, town, or school district; canals, aqueducts, flumes, ditches, or pipes conducting water, heat or gas for the use of the inhabitants of any county, city or town; or for draining any county, city or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets and alleys, and all other public uses for the benefit of any county, city or town, or the inhabitants thereof, which may be authorized by the Legislative Assembly; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes or ordinances by which the same may be authorized.

4. Wharves, docks, piers, chutes, booms, ferries, bridges of all kinds, toll roads, private roads, plank and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating

logs and lumber on streams not navigable, and sites for reservoirs necessary for collecting and storing water.

5. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines, and sites for reservoirs necessary for collecting and storing water.

6. Private roads leading from highways to residences or farms.

7. Telephone or electric light lines.

8. Telegraph lines.

9. Sewerage of any city, county or town, or any subdivision thereof whether incorporated, or unincorporated or of any settlement consisting of not less than ten families, or of any public buildings belonging to the State, or to any college or university.

Sec. 1377. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.

2. An easement, when taken for any other use.

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

Sec. 1378. The private property which may be taken under this Title, includes:

1. All real property belonging to any person.

2. Lands belonging to this State, or to any county, city or town, not appropriated to some public use.

3. Property appropriated to public use; but such property must not be taken unless for a more necessary public use than that to which it has already been appropriated.

4. Franchises for roads, bridges and ferries, and all other franchises; but such franchises must not be taken unless for free highways, free bridges, railroads or other more necessary public use.

5. All rights of way for any and all the purposes mentioned in Section 1376, and any and all structures and improvements thereon, and the lands held and used in connection therewith must be subject to be connected with, crossed, or intersected by any other right of way or improveprovements or structures thereon. They must also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and con-

nections must be made in manner most compatible with the greatest public benefit and least private injury.

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

Sec. 1379. Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.

2. That the taking is necessary to such use.

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. The plaintiff or defendant or any party interested in the proceedings, can appeal to the Supreme Court from any finding or judgment made or rendered under this Title, as in other cases. Such appeal does not stay any further proceedings under this Title.

Sec. 1380. In all cases where land is required for public use, the State, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of Section 1386. The State, or its agents in charge of such public use, may enter upon the land and make examination, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except from injuries resulting from negligence, wantonness or malice.

Sec. 1381. All proceedings under this Title must be brought in the District Court of the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon.

Sec. 1382. The complaint must contain:

1. The name of the corporation, association, commision or person in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right of way be sought, the complaint must show the location, general route and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of the entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties. When application for the condemnation of a right of way for the purposes of sewerage is made on behalf of

a settlement, or town, or county, the county commissioners of the county may be named as plaintiff.

Sec. 1384. The clerk must issue a summons which must contain the names of the parties, a description of the lands proposed to be taken, a statement of the public use for which it is sought, and a notice to the defendants to appear before the court or judge, at a time and place therein specified, and show cause why the property described should not be condemned as prayed for in the complaint. Such summons must, in other particulars, be in form of a summons in a civil action, and must be served in like manner upon each defendant named therein at least ten days previous to the time designated in such notice, for the hearing, and no copy of the complaint need be served. But the failure to make such service upon a defendant does not affect the right to proceed against any or all other of the defendants, upon whom service of summons had been made.

Sec. 1385. All persons named in the complaint, in occupation of, or claiming an interest in, any of the property described in the complaint, or in the damages, for the taking thereof, though not named, may appear, answer or demur, each in respect to his own property or interest.

Sec. 1386. The court or judge has power:

1. To regulate and determine the place and manner of making the connections and crossings, and enjoying the common uses mentioned in Subdivision 5, Section 1378, of this Title, and of the occupying of canyons, passes and defiles, for railroad purposes, as permitted and regulated by the laws of this State, or of the United States.

2. To determine whether or not the use for which the property is sought to be appropriated, is a public use within the meaning of the laws of this State.

3. To limit the amount of property sought to be appropriated, if in the opinion of the court or judge, the quantity sought to be appropriated is not necessary.

4. If the court or judge is satisfied that the public interests require the taking of such lands, it or he must make an order appointing three competent persons, resident in said county, commissioners to ascertain, and determine the amount to be paid by the plaintiff to each owner or other person interested in such property, as damages, by reason of the appropriation of such property, and specify the time and place of the first meeting of such commissioners, and fixing their compensation.

Any party may object to the appointment of any person as a commissioner on the same grounds that he might object to him as a trial juror.

Sec. 1387. The commissioners mentioned in the last section must, before entering upon their duties, severally take and subscribe an oath before some person qualified to administer oaths, to faithfully and impartially discharge the duties of their appointment. The commissioners must meet at the time and place mentioned in the order appointing them, and proceed to examine the lands sought to be appropriated, and shall hear the allegations and evidence of all persons interested in each of the several parcels of land, and shall ascertain and assess:

1. The value of the property sought to be appropriated, and all improvements thereon, pertaining to the realty, and of each and every separate estate and interest therein; if it consist of different parcels the value of each parcel and each estate or interest therein must be separately assessed.

2. If the property sought to be appropriated constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff.

3. Separately, how much the portion not sought to be condemned and each estate or interest therein, will be benefitted, if at all, by the construction of the improvements proposed by the plaintiff, and if the benefit shall be equal to the damage assessed under Subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefits shall be less than the damages assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value.

4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad.

5. As far as practicable, compensation must be assessed for each source of damage separately.

Sec. 1388. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation of all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected. If an order be made letting the plaintiff into possession, as provided in Section 1394, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

Sec. 1389. Within thirty days after making their appraisement, and the assessment of damages, the commissioners must file a report of their proceedings, accompanied by a map, if a right of way be sought, showing the route, location, and termini thereof, in the office of the clerk of the court, and the clerk must notify the parties interested, that such report has been filed, which notice must be served upon all the parties interested, in the same manner as a summons.

Sec. 1390. An appeal to the District Court from the appraisement and assessments made by the commissioners may be taken by any party interested, within thirty days after the service on the party appealing, of the notice of the filing of the report. Such appeal must be taken by the service of a notice thereof, on the adverse party or his attorney, and shall be brought on for trial after the service of such notice, in the same manner as other actions. The damages to which the appellant is entitled must, on the trial, be assessed upon the same principles as hereinbefore prescribed. In case the party appealing does not succeed in increasing the amount of damages allowed by the commissioners, he shall pay the costs of such appeal.

Sec. 1391. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this Title prescribed.

Sec. 1392. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed; but may, at the time of or before the payment, elect to build the fences and cattle guards, and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court in double the assessed cost of the same, to build such fences and cattle guards within eight months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such fences and cattle guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees.

Sec. 1393. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases, and if the money cannot be made on execution, the court or judge, upon a showing to that effect, must set aside and annul the entire proceedings and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

Sec. 1394. When payments have been made, and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court or judge must make a final order of condemnation, which must describe the property condemned, and the purposes of such condemnation. A copy of the order must be filed in the office of the county clerk, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

Sec. 1395. At any time after trial and judgment entered, or pending an appeal from the judgment to the Supreme Court, whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court or judge, as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, the District Court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and, if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court or judge. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defences to the action or proceeding, except as to the amount of damages he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defences interposed by him, excepting his claim for greater compensation. In ascertaining the amount to be paid into court, the court or judge shall take care that the same be sufficient and adequate. The payment of money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations or other contingencies (as between the parties to the proceedings), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court or judge awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted, or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided; and until such time or times the clerk of the court shall be deemed to be the custodian of the money, and shall be liable to the plaintiff upon his official bond for the same, or any part thereof, in case it be for any reason lost or otherwise abstracted or withdrawn. The court may order the money to be deposited in the State treasury, and in such case it shall be the duty of the State Treasurer to receive all moneys, duly receipt for and safely keep the same in a special fund, to be entered on his books as a condemnation fund for such purpose, and for such duty he shall be liable to the plaintiff upon his official bond. The State Treasurer shall pay out such money so deposited in such manner and at such times as the court or a judge thereof may direct. In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

Sec. 1396. The plaintiff must pay the costs in all cases, except as hereinbefore provided.

Sec. 1397. Except as otherwise provided in this Title, the provisions of Part II., of this Code, are applicable to and constitute the rules of practice in the proceedings mentioned in this Title.

Sec. 1398. The provisions of Part II., of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this Title, apply to the proceedings mentioned in this Title; *Provided*, that upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle guards, as provided in Section 1392, the plaintiff shall be entitled to enter into, improve and hold possession of the property sought to be condemned (if not already in possession, as provided in Section 1395), and devote the same to the public use in question; and no motion for new trial or appeal shall, after such payment and filing of such bond, as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in Section 1395, may be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff.

Sec. 1399. Private roads may be opened in the manner to be prescribed by the Political Code, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount together with the expenses of the proceeding shall be paid by the person to be benefited.

Sec. 1400. Nothing in this Code must be construed to abrogate or repeal any statute providing for the taking of property in any city, town or county for road or street purposes.

TITLE VIII.

ESCHEATED ESTATES.

Section 1405. Manner of commencing proceedings relative to escheated estates.

" *1406. Receiver of rents and profits may be appointed.*

Section 1407. Appearance, pleadings and trial.
" *1408. Proceedings by persons claiming escheated estates.*

Sec. 1405. When the Attorney General is informed that any real estate has escheated to this State, he must file an information in behalf of the State in the District Court of the county in which such estate or any part thereof is situated, setting forth a description of the estate, the name of the person last seized, the name of the occupant and person claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof the State of Montana has right by law to such estate. Upon such information a summons must issue to such person, requiring him to appear and answer the information within the time allowed by law in civil actions; and the court must make an order setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within forty days from date of the order, why the same should not vest in this State, which order must be published for at least one month from the date thereof, in a newspaper published in the county, if one be published therein, and in case no newspaper is published in the county, in some other newspaper in this State.

Sec. 1406. The court or judge, upon the information being filed and upon the application of the Attorney General, either before or after answer, upon notice to the party claiming such estate, if known, may, upon sufficient cause therefor being shown, appoint a receiver to take charge and receive the rents and profits of the same until the title to such real estate is finally settled.

Sec. 1407. All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, and the title of the State to lands and tenements therein mentioned, at any time before the time of answering expires, and any other person claiming an interest in such estate may appear and be made a defendant, and by motion for that purpose in open court within the time allowed for answering; and if no person appears and answers within the time, then judgment must be rendered, that the State be seized of the lands and tenements in such information claimed. But if any person appear and deny the title set up by the State, or traverse any material fact set forth in the information, the issue of fact must be tried as issues of facts are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the State has good title to the lands and tenements in the information mentioned, or any part thereof, judgment must be rendered that the State be seized thereof, and recover costs of suit against the defendants. In any judgment rendered, or that has been heretofore rendered by any court of competent jurisdiction, escheating real property to the State, on motion of the Attorney General, the court or judge shall make an order that said real property be sold by the sheriff of the county where the same is situate, at public sale, after giving such notice of the time and place of sale as may be prescribed by the court or judge in said order; that the sheriff shall, within five days after such sale, make a report thereof to the court, and upon the hearing of the said report, the court or judge may examine the said witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expense of a new sale, may be obtained, the court or judge may vacate the sale, and direct another sale to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent. more in amount than that named in the report be made to the court in writing by a responsible person, the court or judge, may, in its or his discretion, accept such offer, and confirm the sale to such person, or order a new sale. If it appears to the court or judge that the sale was legally made, and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum than ten per cent., exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned be made and accepted by the court, the court or judge must make an order confirming the sale, and directing the sheriff, in the name of the State, to execute to purchaser or purchasers a conveyance of said property sold; and said conveyance shall vest in the purchaser or purchasers all the right and title of the State therein, and the sheriff shall, out of the proceeds of such sale, pay the cost of said proceedings incurred on behalf of the State, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court or judge, not exceeding ten per cent. on the amount of such sale, and the residue thereof shall be paid by said sheriff into the State treasury.

Sec. 1408. Within twenty years after judgment in any proceeding had under this Title, a person not a party or privy to such proceeding may file a petition in the District Court of the county in which the seat of government is located, showing his claim or right to the property, or the proceeds thereof. A copy of such petition must be served on the Attorney General at least twenty days before the hearing of the petition, who must answer the same; and the court must thereupon try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the State treasury, then it must order the Auditor to draw his warrant on the treasury for the payment of the same, but without interest or cost to the State, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant. All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within the time limited, or five years after their respective disabilities cease.

TITLE IX.

CHANGE OF NAMES.

Section 1410. Jurisdiction.
" *1411. Application for change of name, how made.*
" *1412. Publication of petition for.*
" *1413. Hearing of application and remonstrance.*
" *1414. Return by clerk of District Court.*

Sec. 1410. Applications for change of names must be heard and determined by the District Court.

Sec. 1411. All applications for change of names must be made to the District Court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under twenty-one years of age, if a male, and under the age of eighteen years, if a female, by one of the parents, if living, or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name; and must, if the father of such person be not living, name, as far as known to the petitioner, the near relatives of such person, and their place of residence. Any religious, benevolent, literary, scientific, or other corporation, or any corporation bearing or having for its name, or using or being known by the name of, any benevolent or charitable order or society, may, by petition, apply to the District Court of the county in which its articles of incorporation were originally filed, or in which the property of such corporation is situated, for a change of its corporate name. Such petition must be signed by a majority of the directors or trustees of the corporation, and must specify the date of the formation of the corporation, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings shall be had as upon applications for changes of names of natural persons, and no banking corporation hereafter organized shall adopt or use the name of any other banking corporation or association, or of ny friendly association.

Sec. 1412. A copy of such petition must be published for four successive weeks, in some newspaper published in the county, if a newspaper be printed therein, but if no newspaper be printed in the county, a copy of such petition must be posted at three of the most public places in the county for a like period, and proofs must be made of such publication before the petition can be considered.

Sec. 1413. Such application must be heard at such time as the court or judge may appoint, and objections may be filed by any person who can, in such objections, show to the court or judge good reason against such change of name. On the hearing the court or judge may examine on oath any of the petitioners, remonstrants, or other persons, touching the application, and may make an order changing the name or dismissing the application, as to the court or judge may seem right and proper.

Sec. 1414. Each clerk of the District Court shall, annually, in the month of January, make a return to the office of Secretary of State of all changes of names made in the District Court of his county under this Title. Such return shall show the date of the judgment of the court, original name, name decreed and residence. Such returns shall be published in a tabular form with the statutes first published thereafter.

TITLE X.

ARBITRATIONS.

Section 1416. What may be submitted to arbitration, and when.
" *1417. Submission to arbitration to be in writing.*
" *1418. Submission may be entered as an order of the court. Revocation.*
" *1419. Powers of arbitrators.*
" *1420. Majority of arbitrators may determine any question. They must be sworn.*
" *1421. Award to be in writing. When judgment to be entered.*
" *1422. Award may be vacated in certain cases.*
" *1423. Court may, on motion, modify or correct the award.*
" *1424. Decision on motion, subject to appeal, but not the judgment entered before motion,*
" *1425. If submission be revoked and an action brought, what to be recovered.*

Sec. 1416. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

Sec. 1417. The submission to arbitration must be in writing, and may be to one or more persons.

Sec. 1418. It may be stipulated in the submission that it be entered as an order of the District Court, for which purpose it must be filed with the clerk of the District Court of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made. When so entered the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court or judge to make an award, and the award may be enforced by the court or judge in the same manner as a judgment. If the submission be not made an order of the court, it may be revoked at any time before the award is made.

Sec. 1419. Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

Sec. 1420. All the arbitrators must meet and act together during the investigation, but when met a majority may determine any question. Before acting they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.

Sec. 1421. The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court the award must be filed with the clerk and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.

Sec. 1422. The court or judge, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud.

2. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced.

3. That the arbitrators exceeded their powers in making the award; or that they refused or improperly omitted to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

Sec. 1423. The court or judge may, on motion, modify or correct the award, where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein.

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not effect the decision on the matters submitted.

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

Sec. 1424. The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before motion made cannot be subject to appeal.

Sec. 1425. If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

TITLE XI.

SOLE TRADER.

Section 1426. Who may become a sole trader.
" 1427. Notice, how given and what to contain.
" 1428. Petition, what to contain and when filed.
" 1429. Who may oppose it and how.
" 1430. Trial and judgment.
" 1431. Oath—copies to be recorded.
" 1432. Rights and liabilities of a sole trader.
" 1433. Must maintain her children—husband not liable—not to act as agent.

Sec. 1426. A married woman may become a sole trader by the judgment of the District Court of the county in which she has resided for six months next preceding the application.

Sec. 1427. A person intending to make application to become a sole trader must publish notice of such intention in a newspaper published in the county, or if none, then in a newspaper published in an adjoining county, for four successive weeks. The notice must specify the day upon which application will be made, the nature and place of the business proposed to be conducted by her and the name of her husband.

Sec. 1428. Ten days prior to the day named in the notice, the applicant must file a verified petition, setting forth:

1. That the application is made in good faith, to enable the

applicant to support herself, or herself and others dependent upon her, giving their names and relation.

2. The fact of insufficient support from her husband, and the cause thereof, if known.

3. Any other grounds of application which are good causes for a divorce, with the reason why a divorce is not sought.

4. The nature of the business, trade or profession proposed to be conducted, and the capital to be invested therein, if any, and the sources from which it is derived.

Sec. 1429. Any creditor of the husband may oppose the application by filing in the court (prior to the day named in the notice), a written opposition, verified, containing either:

1. A special denial of the truth of any material allegation of the petition; or setting forth,

2. That the application is made for the purpose of defrauding the opponent; or,

3. That the application is made to prevent, or will prevent him from collecting his debt.

Sec. 1430. On the day named in the notice or on such other day to which the hearing may be postponed by the court, the applicant must make proof of publication of the notice, hereinbefore required, and the issues of fact joined, if any, must be tried as in other cases; if no issues are joined, the court must hear the proofs of the applicant and find the facts in accordance therewith.

If the facts found sustain the petition, the court must render judgment authorizing the applicant to carry on in her own name and on her own account the business, trade or profession specified in the notice and petition.

Sec. 1431. The sole trader must make and file with the clerk of the court an affidavit, in the following form:

"I, A. B., do solemnly swear that this application was made in good faith, for the purpose of enabling me to support myself (and any dependent, such as husband, parent, sister, child, or the like, naming them, if any) and not with any view to defraud, delay or hinder any creditor or creditors of my husband." A certified copy of the judgment with this oath indorsed thereon, must be recorded in the office of the county clerk of the county where the business, trade or profession is to be carried on, in a book to be kept for such purpose.

Sec. 1432. When the judgment is made and entered, and a copy thereof, with the affidavit provided for in the next preceding section duly recorded, the person therein named is entitled to carry on the business specified, in her own name, and the property, revenues, moneys and credits so by her invested, and the profits thereof, belong exclusively to her, and are not liable for any debts of her husband, and she thereafter has all the privileges of and is liable to all legal processes provided for debtors and creditors, and may sue and be sued alone without being joined with her husband; *Provided*, *however*, that she shall not be at liberty to carry on said business in any other county than that named in the notice provided for in Section 1427, until she has recorded in such other county a copy of said judgment and affidavit.

Sec. 1433. A married woman who is adjudged a sole trader is liable for the maintenance of her minor children. The husband of a sole trader is not liable for any debts contracted by her in the course of her sole trader's business, unless contracted upon his written consent; but he must not manage or superintend for his wife any business, trade or profession authorized by this Title, or act as her agent therein. In case he does so act, the property of such sole trader is liable for his debts.

TITLE XII.

PROBATE PROCEEDINGS.

Chapter *I. Jurisdiction.*
" *II. Probate of Wills.*
" *III. Executors and Administrators, Their Letters, Bonds, Removals and Suspensions.*
" *IV. Inventory and Collection of the Effects of Decedents.*
" *V. Provisions for the Support of Family, and the Homestead.*
" *VI. Claims Against the Estate.*
" *VII. Sales and Conveyances of Property to Decedents.*
" *VIII. Powers and Duties of Executors and Administrators, and the Management of Estates.*
" *IX. Conveyance of Real Estate by Executors and Administrators in Certain Cases.*
" *X. Accounts Rendered by Executors and Administrators, and the Payment of Debts.*
" *XI. Partition, Distribution, and Final Settlement of Estates.*
" *XII. Orders, Process, Minutes, Records and Appeals.*
" *XIII. Public Administrator.*
" *XIV. Guardian and Ward.*

CHAPTER I.

JURISDICTION.

Section 1435. Jurisdiction of the court over the estate, when exercised.
" *1436. When jurisdiction decided by first application.*

Sec. 1435. Wills must be proved, and letters testamentary or of administration granted:

1. In the county in which the decedent was a resident at the time of his death, in whatever place he may have died.

2. In the county of which the decedent may have died, leaving estate therein, he not being a resident of the State.

3. In the county in which any part of the estate may be, the decedent having died out of the State, and not resident thereof at the time of his death.

4. In the county in which any part of the estate may be, the decedent not being a resident of the State, and not leaving estate in the county in which he died.

5. In all other cases, in the county where application for letters is first made.

Sec. 1436. When the estate of the decedent is in more than one county, he having died out of the State, and not having been a resident thereof at the time of his death, or being such non-resident, and dying within the State, and not leaving estate in the county where he died, the District Court of that county in which the application is first made, for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.

CHAPTER II.

PROBATE OF WILLS.

Article I. Petition, Notice and Proof.
" II. Contesting Probate of Will.
" III. Probate of Foreign Wills.
" IV. Contesting Will After Probate.
" V. Probate of Lost or Destroyed Will.
" VI. Probate of Nuncupative Wills.

ARTICLE II.

PETITION, NOTICE AND PROOF.

Section 1438. Custodian of will, to deliver same, to whom. Penalty.
" 1439. Who may petition for probate of will.
" 1440. Contents of petition.
" 1441. When executor forfeits right to letters.
" 1442. Will to accompany petition or its presentation prayed for and how enforced.
" 1443. Notice of petition for probate, how given.
" 1444. Heirs and named executors to be notified, how.
" 1445. Petition may be presented to judge at chambers, and what judge may do.
" 1446. Hearing proof of will after proof of service of notice.
" 1447. Who may appear and contest the will.
" 1448. Probate, when no contest.
" 1449. Olographic wills.

Sec. 1438. Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the District Court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.

Sec. 1439. Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the State, or a nuncupative will.

Sec. 1440. A petition for the probate of a will must show:

1. The jurisdictional facts.

2. Whether the person named as executor consents to act, or renounces his right to letters testamentary.

3. The names, ages and residences of the heirs and devisees of the decedent, so far as known to the petitioner.

4. The probable value and character of the property of the estate.

5. The name of the person for whom letters testamentary are prayed.

No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will.

Sec. 1441. If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition to the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court or judge may appoint any other competent person administrator, unless good cause for delay is shown.

Sec. 1442. If it is alleged in any petition that any will is in the possession of a third person, and the court or judge is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order. If he has possession of the will and neglects or refuses to produce it in obedience to the order, he may, by warrant from the court or judge, be committed to the jail of the county, and be kept in close confinement until he produces it.

Sec. 1443. When the petition is filed and the will produced, the clerk of the court must set the petition for hearing by the court or judge upon some day not less than ten nor more than thirty days from the production of the will. Notice of hearing shall be given by such clerk by publishing the same in a newspaper in the county; if there is none, then by three written or printed notices posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and last day being included. If the notice is by posting, it must be given at least ten days before the hearing.

Sec. 1444. Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the State, at their places of residence, if known to the petitioner, and deposited in the postoffice, with the postage thereon prepaid, at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them, and deposited in the postoffice at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as co-executor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing.

Sec. 1445. A judge of the District Court may at any time, in court and at chambers, receive petitions for the probate of wills, and make and issue all necessary orders and writs, to enforce the production of wills, and the attendance of witnesses, and may appoint special sessions of his court for hearing petitions, trials of issue, and admitting wills to probate.

Sec. 1446. At the time appointed for the hearing, or the time to which the hearing may have been postponed, the court or judge, unless the parties appear, must require proof that the notice has been given, which being made, the court or judge must hear testimony in proof of will.

Sec. 1447. Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court or judge for that purpose; but a contest made by an attorney appointed by the court or judge does not bar a contest after probate by the party so represented if commenced within the time provided in Article IV., of this Chapter; nor does the non-appointment of an attorney by the court or judge of itself invalidate the probate of a will.

Sec. 1448. If no person appears to contest the probate of a will, the court or judge may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

Sec. 1449. An olographic will may be proved in the same manner that other private writings are proved.

ARTICLE II.

CONTESTING PROBATE OF WILLS.

Section 1452. Contestant to file grounds of contest, and petitioner to reply.
" *1453. How jury obtained and trial had.*
" *1454. Verdict of jury. Judgment. Appeal.*
" *1455. Witnesses, who and how many to be examined. Proof of handwriting, admitted, when.*
" *1456. Testimony reduced to writing for future evidence.*
" *1457. If proved, certificate to be attached.*
" *1458. Will and proof to be filed and recorded.*

Sec. 1452. If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in Part II., Title VI., Chapter III., of this Code. If the demurrer is sustained, the court or judge must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving :

1. The competency of the decedent to make a last will and testament.

2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence.

3. The due execution and attestation of the will by the decedent or subscribing witnesses ; or,

4. Any other questions substantially affecting the validity of the will, must, on request of either party in writing, filed three days prior to the day set for the hearing, be tried by a jury. If no jury is demanded, the court or judge must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant.

Sec. 1453. When a jury is demanded, the District Court must impanel a jury to try the case, in the manner provided for impaneling juries in courts of record; and the trial must be conducted in accordance with the provisions of Part II., Title VIII., Chapter IV., of this Code. A trial by the court must be conducted as provided in Part II., Title VIII., Chapter V., of this Code.

Sec. 1454. The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court; upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will be admitted to probate, the judgment, will and proofs must be recorded.

Sec. 1455. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence, or insanity of any of them must be satisfactorily shown to the court or judge. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

Sec. 1456. The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this State.

Sec. 1457. If the court or judge is satisfied upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, a certificate of the proof and the facts found, signed by the judge and attested by the seal of the court, must be attached to the wll.

Sec. 1458. The will, and a certificate of the proof thereof, must be filed and recorded by the clerk, and the same, when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony shall be filed by the clerk.

ARTICLE III.

PROBATE OF FOREIGN WILLS.

Section 1460. Wills proved in other States to be recorded, when and where.
" *1461. Proceedings on the production of a foreign will.*
" *1462. Hearing proofs of probate of foreign will.*

Sec. 1460. All wills duly proved and allowed in any other of the United States, or in any foreign country or State, may be allowed and recorded in the District Court of any county in which the testator shall have left any estate.

Sec. 1461. When a copy of the will and probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing, notice whereof must be given as hereinbefore provided for an original petition for the probate of a will.

Sec. 1462. If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this State, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this State, and letters testamentary or of administration issued thereon.

ARTICLE IV.

CONTESTING WILL AFTER PROBATE.

Section 1465. The probate may be contested within one year.
" *1466. Citation to be issued to parties interested.*
" *1467. The hearing had on proof of service.*
" *1468. Petitions to revoke probate of will tried by jury or court. Judgment, what.*
" *1469. On revocation of probate, powers of executor etc., cease, but not liable for acts in good faith.*
" *1470. Costs and expenses, by whom paid.*
" *1471. Probate, when conclusive. One year after removal of disability given to infants and others.*

Sec. 1465. When a will has been admitted to probate any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.

Sec. 1466. Upon filing the petition a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the State, so far as known to the petitioner, or to their guardians, if any of them are minors, or to their personal representatives, if any of them are dead, requiring them to appear before the court or judge on some day therein specified to show cause why the probate of the will should not be revoked.

Sec. 1467. At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court or judge must proceed to try the issues of fact joined in the same manner as in an original contest of a will.

Sec. 1468. In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or, if no jury is had, the court or judge shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.

Sec. 1469. Upon the revocation being made, the powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

Sec. 1470. The fees and expenses must be paid by the party contesting the validity or probate of the will if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

Sec. 1471. If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed.

ARTICLE V.

PROBATE OF LOST OR DESTROYED WILL.

Section 1473. Proof of lost or destroyed will to be taken.
" 1474. Must have been in existence at time of death.
" 1475. To be certified, recorded, and letters thereon granted.
" 1476. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.

Sec. 1473. Whenever any will is lost or destroyed the District Court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills as in other cases. All the testimony given must be reduced to writing and signed by the witnesses.

Sec. 1474. No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

Sec. 1475. When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified and filed as in other cases, and shall have the same effect as evidence as provided in Section 1456.

Sec. 1476. If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

ARTICLE VI.

THE PROBATE OF NUNCUPATIVE WILLS.

Section 1478. Nuncupative wills, when and how admitted to probate.
" 1479. Additional requirements in probate of nuncupative wills.
" 1480. Contests and appointments to conform to provisions as to other wills.

Sec. 1478. Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in Article I., Chapter II., of this Title. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

Sec. 1479. The District Court or judge must not receive or entertain a petition for the probate of a nuncupative will until the lapse of ten days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife, if any, and all other persons resident in the State or county interested in the estate, are notified as hereinbefore provided.

Sec. 1480. Contests of the probate of nuncupative wills, and appointments of executors and administrators of the estate devised thereby, must be had, conducted, and made as hereinbefore provided in cases of the probate of written wills.

CHAPTER III.

EXECUTORS AND ADMINISTRATORS, THEIR LETTERS, BONDS, REMOVALS AND SUSPENSIONS.

Article I. Letters Testamentary and of Administration, With the Will Annexed, How and to Whom Issued.
" *II. Form of Letters.*
" *III. Letters of Administration, to Whom and the Order in Which They Are Granted.*
" *IV. Petition and Contest for Letters, and Action Thereon.*
" *V. Revocation of Letters and Proceedings Therefor.*
" *VI. Oaths and Bonds of Executors and Administrators.*
" *VII. Special Administrators and Their Powers and Duties.*
" *VIII. Wills Found After Letters of Administration Granted.*
" *IX. Disqualification of Judges and Transfers of Administration.*
" *X. Removals and Suspensions in Certain Cases.*

ARTICLE I.

LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED, HOW AND TO WHOM ISSUED.

Section 1483. To whom letters on proved will to issue.
" *1484. Who are incompetent as executors or administrators. Letters with will annexed to issue, when.*
" *1485. Interested parties may file objections.*
" *1486. Unmarried woman executrix or administratrix marrying, her authority does not cease.*
" *1487. Executor of an executor.*
" *1488. Letters of administration to a minor.*
" *1489. Acts of a portion of executors valid.*
" *1490. Authority of administrators, with will annexed. Letters, how issued.*

Sec. 1483. The court or judge admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, who must appear and qualify, unless objection is made, as provided in Section 1485.

Sec. 1484. No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority.

2. Convicted of an infamous crime.
3. Adjudged by the court or judge incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration, with the will annexed, must be issued as designated and provided for the grant of letters in cases of intestacy.

Sec. 1485. Any person interested in a will may file objections, in writing, to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court or judge; a petition may, at the same time, be filed for letters of administration, with the will annexed.

Sec. 1486. When an unmarried woman appointed executrix marries, her authority is not extinguished. When a married woman is named as executrix she may be appointed and serve in every respect as an unmarried woman.

Sec. 1487. No executor of an executor shall as such be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration, with the will annexed, of the estate of the first testator, left unadministered, must be issued.

Sec. 1488. Where a person absent from the State, or a minor, is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor letters of administration, with the will annexed, must be granted; but the court or judge may, in its or his discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority.

Sec. 1489. When all the executors named are not appointed by the court or judge those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators the act of one alone shall be effectual, if the other is absent from the State or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority in writing to act for both; and where there are more than two executors or administrators the act of a majority is valid.

Sec. 1490. Administrators, with the will annexed, have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court, and bear the seal thereof.

ARTICLE II.

FORM OF LETTERS.

Section 1492. Form of letters testamentary.
" *1493. Form of letters of administration, with the will annexed.*
" *1494. Form of letters of administration.*

Sec. 1492. Letters testamentary must be substantially in the following form:

State of Montana, county of ————. The last will of A. D., deceased, a copy of which is hereto annexed, having been proved and recorded in the District Court of the county of ————, C. D., who is named therein as such, is hereby appointed executor. Witness, G. H., clerk of the District Court of the county of ————, with the seal of the court affixed, the —— day of ————, A. D. 18—. (Seal.) By order of the court. G. H., Clerk.

Sec. 1493. Letters of administration with the will annexed must be substantially in the following form:

State of Montana, county of ————. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the District Court of the county of ————, and there being no executor named in the will (or as the case may be), C. D. is hereby appointed administrator, with the will annexed. Witness, G. H., clerk of the District Court of the county of ————, with the seal of the court affixed, the —— day of ————, A. D. 18—. (Seal.) By order of the court. G. H., clerk.

Sec. 1494. Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form: State of Montana, county of————. C. D. is hereby appointed administrator of the estate of A. B., deceased. (Seal.) Witness, G. H., clerk of the District Court of the county of————, with the seal thereof affixed, the——day of————, A. D. 18—. By order of the court. G. H., clerk.

ARTICLE III.

LETTERS OF ADMINISTRATION, TO WHOM AND THE ORDER IN WHICH THEY ARE GRANTED.

Section 1496. Order of persons entitled to administer, partner not to administer.
" *1497. Preference of persons equally entitled.*
" *1498. In discretion of court or judge to appoint administrator, when.*
" *1499. When minor entitled, who appointed administrator.*
" *1500. Who are incompetent to act as administrators.*
" *1501. Married woman may be administratix.*

Sec. 1496. Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof, and they are, respectively, entitled therein in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. A creditor.
9. Public administrator.
10. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of the estate.

Sec. 1497. Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

Sec. 1498. When there are several persons equally entitled to the administration, the court or judge may grant letters to one or more of them.

Sec. 1499. If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court or judge.

Sec. 1500. No person is competent or entitled to serve as administrator or administratrix who is:

1. Under the age of majority.
2. Not a *bona fide* resident of the State, but if the person entitled to serve is not a resident of the State, he may request the court or judge to appoint a resident of the State to serve as administrator, and such person may be appointed.
3. Convicted of an infamous crime.
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity.

Sec. 1501. A married woman may be appointed administratrix. When an unmarried woman marries, her authority continues.

ARTICLE IV.

PETITION FOR LETTERS AND ACTION THEREON.

Section 1504. Applications, how made.
" 1505. When granted.

Section 1506. Notice of application.
" *1507. Contesting applications.*
" *1508. Hearing of application.*
" *1509. Evidence of notice.*
" *1510. Grant to any applicant.*
" *1511. What proof must be made before granting letters of administration.*
" *1512. Letters may be granted to others than those entitled.*

Sec. 1504. Petitions for letters of administration must be in writing, signed by the applicant or his attorney, and filed with the clerk of the court, stating the facts essential to give jurisdiction of the case, and when known to the applicant, he must state the names, ages and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterward proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments.

Sec. 1505. Letters of administration may be granted by the court or judge at any time appointed for the hearing of the application, or at any time to which the hearing is continued or postponed.

Sec. 1506. When a petition praying for letters of administration is filed, the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing.

Sec. 1507. Any person interested may contest the petition, by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his rights to the administration, and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court or judge must hear the two petitions together.

Sec. 1508. On the hearing, it being first proved that notice has been given as herein required, the court or judge must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

Sec. 1509. An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive notice of the fact of such notice.

Sec. 1510. Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves.

Sec. 1511. Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others, and the court or judge may also examine any other person concerning the time, place, and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

Sec. 1512. Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the State, affidavits, taken *ex parte* before any officer authorized by the laws of this State to take acknowledgments and administer oaths out of this State, may be received as *prima facie* evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.

ARTICLE V.

REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

Section 1514. Revocation of letters of administration.
" *1515. When petition filed, citation to issue.*
" *1516. Hearing of petition for revocation.*
" *1517. Prior rights of relatives entitles them to revoke prior letters.*

Sec. 1514. When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him.

Sec. 1515. When such petition is filed, the clerk must, in addition to the notice provided in Section 1506, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing.

Sec. 1516. At the time appointed, the citation having been duly served and returned, the court or judge must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.

Sec. 1517. The surviving husband or wife, when letters of administration have been granted to a child, father, brother or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right and obtain letters of administration, and have letters before granted revoked in the manner prescribed in the three preceding sections.

ARTICLE VI.

OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS, ETC.

Section 1520. Administrator or executor to take oath. Letters and bond to be recorded.
" *1521. Bond of administrators, form and requirements of.*
" *1522. Additional bonds, when required.*
" *1523. Condition of bonds.*
" *1524. Each, or more than one administrator, to give separate bonds.*
" *1525. Several recoveries to be had on same bond.*
" *1526. Bonds and justification of sureties on. Must be approved.*
" *1527. Citation and requirements of judge on deficient bond. Additional security.*
" *1528. Right ceases, when.*
" *1529. When bond may be dispensed with.*
" *1530. Petition showing failing sureties and asking for further bonds.*
" *1531. Citation to executor, etc., to show cause against such application.*
" *1532. Further security may be ordered.*
" *1533. Neglecting to obey order.*
" *1534. Suspending powers of executor, etc.*
" *1535. Further security without application of party in interest.*
" *1536. Release of sureties.*
" *1537. New sureties.*
" *1538. Neglect to give new sureties forfeits letters.*

Sec. 1520. Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors and administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose.

Sec. 1521. Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the State of Montana, with two or more sufficient sureties, to be approved by the District Court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of real property belonging to the estate, which value must be ascertained by the District Court, or a judge thereof, by examining on oath the party applying, and any other persons.

Sec. 1522. The court or judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court or judge that the penalty of the bond given before receiving letters, or any bond given in place thereof, is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

Sec. 1523. The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

Sec. 1524. When two or more persons are executors or administrators the court or judge must require and take a separate bond from each of them.

Sec. 1525. The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time by any person aggrieved, in his own name, until the whole penalty is exhausted.

Sec. 1526. In all cases where bonds or undertakings are required to be given under this Title the sureties must justify thereon in the same manner and in like amounts as required by Section 1204, of this Code, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by a judge of the District Court before being filed or recorded.

Sec. 1527. Before the judge approves the bond required under this Title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one of them, are not worth as much as they have justified to, order a citation to issue requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause a notice to be issued to the executor or administrator requiring his appearance on the return of the citation; and on its return he may examine the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security.

Sec. 1528. If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.

Sec. 1529. When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed without any bond, unless the court or judge, for good cause, require one to be executed; but the executor may at any time afterward, if it appear from any cause necessary or proper, be required to file a bond, as in other cases.

Sec. 1530. Any person interested in an estate may, by verified petition, represent to the court or judge that the sureties of the executor or administrator thereof have become, or are becoming insolvent, or that they have removed or are about to remove, from the State, or that from any other cause the bond is insufficient, and ask that further security be required.

Sec. 1531. If the court or judge is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded or cannot be found, it may be served by leaving a copy of it at his place of residence, or by such publication as the court or judge may order.

Sec. 1532. On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security from any cause is insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form, within a reasonable time, not less than five days.

Sec. 1533. If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

Sec. 1534. When a petition is presented, praying that an executor or administrator be required to give further security, or to give bond, where by the terms of the will no bond was originally required, and it is alleged that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

Sec. 1535. When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

Sec. 1536. When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the court or judge for relief. The court or judge must cause a citation to the executor or administrator to be issued and served personally, requiring him to appear at a time and place to be therein specified, and to give other security. If he has absconded, left, or removed from the State, or if he cannot be found after due diligence and inquiry, service may be had as provided in Section 1531.

Sec. 1537. If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.

Sec. 1538. If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must revoke his letters.

ARTICLE VII.

SPECIAL ADMINISTRATORS, AND THEIR POWERS AND DUTIES.

Section 1540. Special administrators, when appointed.
" *1541. Special letters may be issued out of term time.*
" *1542. Preference given to persons entitled to letters.*
" *1543. Special administrator to give bond and take oath.*
" *1544. Duties of special administrator.*
" *1545. When letters testamentary or of administration are granted, special administrator's powers cease.*
" *1546. Special administrator to render account.*

Sec. 1540. When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended or removed, the court or judge must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate.

Sec. 1541. The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person in conformity with the order.

Sec. 1542. In making the appointment of a special administrator the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.

Sec. 1543. Before any letters issue to any special administrator he must give bonds in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned for the faithful performance of his duties; and he must take the usual oath and have the same indorsed on his letters.

Sec. 1544. The special administrator must collect and preserve for the executor or administrator all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues, and profits, claims and demands of the estate; must take the charge and management of, enter upon and preserve from damage, waste and injury the real estate; and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator; he may sell such perishable property as the court or judge may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent.

Sec. 1545. When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands, and the executor may prosecute to final judgment any suit commenced by the special administrator.

Sec. 1546. The special administrator must render an account, on oath, of his proceedings in a like manner as other administrators are required to do.

ARTICLE VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED, AND MISCELLANEOUS PROVISIONS.

Section 1548. On proof of will, after grant of letters of administration, letters revoked.
" 1549. Power of executor in such case.
" 1550. Remaining executor or administrator to continue when his colleagues are disqualified.
" 1551. Who to act when all acting are incompetent.

Section 1552. Executor or administrator may resign, when. Court to appoint successor. Liability of outgoer.

" *1553. All acts of executor, etc., valid until his power is revoked.*

" *1554. Transcript of court minutes to be evidence.*

Sec. 1548. If, after granting letters of administration on the ground of intestacy, a will of the decedent is duly proved and allowed by the court or judge, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court or judge shall direct.

Sec. 1549. In such case the executor or the administrator, with the will annexed, is entitled to demand, sue for, recover and collect all the rights, goods, chattels, debts and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

Sec. 1550. In case any one of several executors or administrators to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.

Sec. 1551. If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court or judge must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority.

Sec. 1552. Any executor or administrator may, at any time, by writing, filed in the court, resign his appointment, having first settled his accounts and deliver up all the estate to the person whom the court or judge shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released or affected by such appointment or resignation.

Sec. 1553. All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid to all intents and purposes as if such executor or administrator had continued lawfully to execute the duties of his trust.

Sec. 1554. A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk, under his hand and the seal of the court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves.

ARTICLE IX.

DISQUALIFICATION OF JUDGES AND TRANSFERS OF ADMINISTRATIONS.

Section 1557. When judge not to act.
" 1558. Judge being disqualified, proceedings to be transferred, and where.
" 1559. Transfer not to change right to administer. Retransfer, how made.
" 1560. When proceedings to be returned to original court.

Sec. 1557. No will shall be admitted to probate or letters testamentary or of administration granted, before any judge who is interested as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other way interested or disqualified from acting.

Sec. 1558. When a petition is filed in the District Court praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the court for the settlement of an estate, and there is no judge of said court qualified to act, an order must be made transferring the proceeding to the District Court of an adjoining county; and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceeding is ordered to be transferred, a certified copy of the order and all the papers on file in his office in the proceeding; and thereafter the court or judge to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction over the estate.

Sec. 1559. The transfer of a proceeding from one court to another, as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order herein provided. If, before the administration is closed on any estate so transferred as herein provided, another person is elected or appointed, and qualified as judge of the court wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the cause for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts, and moving the court therefor.

Sec. 1560. On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of the parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the court where it originally commenced, and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced, a certified copy of the order, and all the original papers on file in his office in the proceeding, and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate.

ARTICLE X.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

Section 1562. Suspension of powers of executor.
" *1563. Executor to have notice of his suspension, and to be cited to appear.*
" *1564. Any party interested may appear on hearing.*
" *1565. Notice to absconding executors and administrators.*
" *1566. May compel attendance.*

Sec. 1562. Whenever the judge of a District Court has reason to believe, from his own knowledge or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or has permanently removed from the State, or has wrongfully neglected the estate, or has neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated.

Sec. 1563. When such suspension is made the notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court or judge is satisfied that there exists cause for his removal, his letters must be revoked and letters of administration granted anew, as the case may require.

Sec. 1564. At the hearing any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as herein before provided. The issues raised must be heard and determined by the court or judge.

Sec. 1565. If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the State, notice may be given to him of the pendency of the proceedings by publication in such manner as the court or judge may direct, and the court or judge may proceed upon such notice as if the citation had been personally served.

Sec. 1566. In the proceedings authorized by the preceding sections of this Article, for the removal of an executor or administrator, the court or judge may compel his attendance by attachment, and may compel him to answer questions on oath, touching his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both.

CHAPTER IV.

THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.

Article I. Inventory, Appraisement and Possession of Estate.
" II. Embezzlement and Surrender of Property of Estate.

ARTICLE I.

INVENTORY, APPRAISEMENT AND POSSESSION OF ESTATE.

Section 1569. Inventory to be returned, including the homestead.
" 1570. Appraisement and pay of appraisers.
" 1571. Oath of appraisers and inventory.
" 1572. Inventory to account for moneys. If all money, no appraisement necessary.
" 1573. Effect of naming a debtor executor.
" 1574. Discharge or bequest of debtor against executor.

Section 1575. To make oath to inventory.
" 1576. Letters may be revoked for neglect of administrator.
" 1577. Inventory of after-discovered property.
" 1578. Administrator and executor to possess real and personal estate.
" 1579. Executor or administrator to deliver real estate to heirs and devisees at the end of ten months, unless there are debts to be satisfied.

Sec. 1569. Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge.

Sec. 1570. To make the appraisement the court or judge must appoint three disinterested persons, any two of whom may act, who are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements; if only one day's service is charged the account need not be verified. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed by the District Court or judge having jurisdiction of the estate, or by the District Court or judge of such other county, on request of the court or judge having jurisdiction.

Sec. 1571. Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles, respectively; the inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, may be collected on each debt, interest or security.

Sec. 1572. The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator; and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases.

Sec. 1573. The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for such money in his hands, when the debt or demand becomes due.

Sec. 1574. The discharge or bequest in a will, of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

Sec. 1575. The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

Sec. 1576. If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall for reasonable cause allow, the court or judge may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.

Sec. 1577. Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this Article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

Sec. 1578. The executor or administrator is entitled to the possession of all the real or personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court or judge to the heirs or devisees; and must keep in good tenantable repair all houses, buildings and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to or for partition of the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do.

Sec. 1579. Unless it satisfactorily appear to the court or judge that the rents, issues and profits of the real estate for a longer period are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, the court or judge at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or the devisees.

ARTICLE II.

EMBEZZLEMENT AND SURRENDER OF PROPERTY OF THE ESTATE.

Section 1582. Embezzling estate before grant of letters testamentary.
" *1583. Citation to person suspected to have embezzled estate, etc.*
" *1584. Refusal to obey citation, penalty for, and for embezzlement. May be compelled to disclose by imprisonment. Liable for double damages.*
" *1585. Persons intrusted with the estate of decedent may be cited to account.*

Sec. 1582. If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

Sec. 1583. If any executor or administrator, or any person interested in the estate of a decedent, complains to the court or judge, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidences of or tend to disclose the right, title, interest or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where such decedent dies, or where letters have been granted, he may be cited and examined either before the District Court or judge of the county where he is found, or before the District Court or judge of the county where the decedent dies, or where letters have been granted. But if he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

Sec. 1584. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court or judge may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidence of or tending to disclose the right, title, interest or claim, of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court or judge may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be *prima facie* evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for the return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

Sec. 1585. The court or judge upon the complaint on oath of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent to appear before such court or judge, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court or judge may proceed against him as provided in the preceding section.

CHAPTER V.

PROVISIONS FOR THE SUPPORT OF THE FAMILY AND THE HOMESTEAD.

Article I. Provisions for the Support of the Family.
" II. The Homestead.

ARTICLE I.

PROVISION FOR THE SUPPORT OF THE FAMILY.

Section 1588. Widow and minor children may remain in decedent's house, etc.
" *1589. All property exempt from execution to be set apart for use of family.*
" *1590. May make extra allowance.*
" *1591. Payment of allowance.*
" *1592. Property set apart, how apportioned between widow and children.*
" *1593. Estates less than fifteen hundred dollars to go to wife and child; those less than three thousand to be summarily administered.*
" *1594. When all property to go to children.*

Sec. 1588. When a person dies leaving a widow and minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the court or judge.

Sec. 1589. Upon the return of the inventory, or any subsequent time during the administration, the court or judge may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded; if no homestead has been selected, designated and recorded the court or judge must select, designate and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife, and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided for in Article II., of this Chapter, out of the real estate belonging to the decedent.

Sec. 1590. If the amount set apart be insufficient for the support of the widow and children, or either, the court or judge must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

Sec. 1591. Any allowance made by the court or judge, in accordance with the provisions of this Article, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

Sec. 1592. When property is set apart for the use of the family, in accordance with the provisions of this Chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one.. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate property of the deceased, the court or judge can only set it apart for a limited period, to be designated in the order, which shall be a life estate to husband or wife, and the title vests in the heirs of the deceased, subject to such order.

Sec. 1593. If on the return of the inventory of the estate of an intestate, it appears that the value of the whole estate does not exceed the sum of fifteen hundred dollars, the court or judge by an order for that purpose, must assign for the use and support of the widow and minor child or children, if there be a widow or minor child, and if no widow, then for the children, if there are any, the whole of the estate, after the payment of the expenses of his last illness, funeral charges, and expenses of the administration, and there must be no further proceedings in the administration, unless further estate be discovered; and when it so appears that the value of the whole estate does not exceed the sum of three thousand dollars, it is in the discretion of the court or judge to dispense with the regular proceedings, or any part thereof, prescribed in this Title, and there must be had a summary administration of the estate, and order of distribution thereof at the end of six months after the issuing of letters. The notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases.

Sec. 1594. If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this Article, the whole property so set apart, other than the homestead, must go to the minor children.

ARTICLE II.

THE HOMESTEAD.

Section 1600. Rights of survivor to homestead.
" 1601. Selected and recorded homestead set apart to person entitled. Subsisting liens to be paid by solvent estate.
" 1602. Appraisers to carve out of the original, exceeding twenty-five hundred dollars in value, a homestead, and report the same.

Section 1603. Report of the appraisers. Majority and minority, which may be confirmed.
" *1604. Day to be set for rejecting or confirming the report of the appraisers. Appeal.*
" *1605. Costs, to whom chargeable. Persons succeeding to rights of homestead owners have all their powers and rights.*
" *1606. Certified copies of certain orders to be recorded.*

Sec. 1600. If the homestead selected by the husband or wife, or either of them, during their coverture, and recorded while both were living, was selected from the separate property of the person selecting or joining in the selection of the same, it vests on the death of the husband or wife, in the survivor for life.

Sec. 1601. If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding twenty-five hundred dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the court or judge must, by order, set it off to the persons in whom title is vested by the preceding sections. If there be subsisting liens or incumbrances on tbe homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that puropse, the claims so secured shall be paid proportionately with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment.

Sec. 1602. If the homestead, as selected and recorded, be returned in the inventory appraised at more than twenty-five hundred dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeded twenty-five hundred dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the persons entitled thereto, such portion of the premises, including the dwelling house, as will amount in value to the sum of twenty-five hundred dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of twenty-five hundred dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the court or judge may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto. Such order of sale must state in what manner the sale shall be conducted and what notice must be given thereof, and on the return of the sales to the court or judge, and after the distribution of the proceeds, the executor or administrator must give a deed of the premises to the purchaser. The proceeds shall be distributed as follows: The liens or incumbrances must be first paid, subject to the provisions hereinbefore stated, and then twenty-five hundred dollars to the persons entitled thereto, and the balance, if any, must be paid into the funds of the estate.

Sec. 1603. Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court or judge in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.

Sec. 1604. When the report of the appraisers is filed, the court or judge must set a day for hearing any objections thereto, from any one interested in the estate. Notice of hearing must be given for such time, and in such manner as the court or judge may direct. If the court or judge be satisfied that the report is correct it must be confirmed, otherwise rejected. In case the report is rejected, the court or judge may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report as upon the first report.

Sec. 1605. The costs of all proceedings provided for in this Chapter, must be paid by the estate as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this Chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire.

Sec. 1606. A certified copy of every order made in pursuance of this Article, by which a report is confirmed, property assigned or sale confirmed, must be recorded in the office of the county clerk of the county where the homestead property is situated.

CHAPTER VI.

CLAIMS AGAINST THE ESTATE.

Section 1610. Notice to creditors. Additional notice.
" *1611. Time expressed in the notice.*
" *1612. Copy and proof of notice to be filed and order made.*

Section 1613. Time within which claims against an estate to be presented.
" *1614. Claims to be sworn to, and when allowed to bear same interest as judgments.*
" *1615. Judge may present claim, and action thereon,*
" *1616. Allowance and rejection of claims.*
" *1617. Approved claims or copies to be filed. Claims secured by liens may be described. Lost claims.*
" *1618. Rejected claims to be sued for within three months.*
" *1619. Claims barred by statute of limitations. When and who judge may examine.*
" *1620. Claims must be presented before suit.*
" *1621. Time of limitation.*
" *1622. Claims in action pending at time of decease.*
" *1623. Allowance of claim in part.*
" *1624. Effect of judgment against executor.*
" *1625. Execution not to issue after death. If one is levied the property may be sold.*
" *1626. What judgment is not a lien on real property of an estate.*
" *1627. May refer doubtful claims. Effect of referee's allowance or rejection.*
" *1628. Trial by referee, how confirmed and its effect.*
" *1629. Liability of executor, etc., for costs.*
" *1630. Claims of executor, etc., against the estate.*
" *1631. Executor neglecting to give notice to creditors, to be removed.*
" *1632. Executor to return statement of claims.*
" *1633. Executor may pay interest.*

Sec. 1610. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation.

Sec. 1611. The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not.

Sec. 1612. After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court or judge, an order showing that due notice to creditors has been given, and direcing that such order be entered in the minutes and recorded, must be made by the court, or judge.

Sec. 1613. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented, is barred forever; *Provided, however*, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this Chapter, by reason of being out of the State, it may be presented at any time before an order of distribution is entered.

Sec. 1614. Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the District Court.

Sec. 1615. Any judge of the District Court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof, and if the executor or administrator allows the claim, he must in writing designate some judge of the District Court of an adjoining county or district, who, upon the presentation of such claim to him, is vested with power to allow or reject it, and the judge presenting such claim, in case of its rejection by the executor or administrator, or by such judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected.

Sec. 1616. When a claim, accompanied by the affidavit required in this Chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to the judge for his approval, who must in the same manner indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, shall be *prima facie* evidence of such presentation, and the date thereof. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

Sec. 1617. Every claim allowed by the executor or administrator, and approved by the judge, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim be founded on a bond, bill, note, or other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim, or any part thereof, be secured by a mortgage, or other lien which has been recorded in the office of the county clerk of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume and page of its record. If, in any case, the claimant has left an original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance.

Sec. 1618. When a claim is rejected either by the executor or administrator, or the judge, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred.

Sec. 1619. No claim must be allowed by the executor or administrator, or by the judge, which is barred by the statute of limitations. When a claim is presented to a judge for his allowance he may, in his discretion, examine the claimant and others on oath and hear any legal evidence touching the validity of the claim.

Sec. 1620. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case:

An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented.

Sec. 1621. The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed.

Sec. 1622. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases, and no recovery shall be had in the action unless proof be made of the presentations required.

Sec. 1623. Whenever any claim is presented to an executor or administrator or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recover a greater amount than that offered to be allowed.

Sec. 1624. A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.

Sec. 1625. When any judgment has been rendered for or against the testator or intestate, in his lifetime, no execution shall issue thereon after his death, except as provided in Section 750. A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.

Sec. 1626. A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration.

Sec. 1627. If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement in writing, with the claimant, to refer the matter in controversy to some disinterested person, to be approved by the court or judge. Upon filing the agreement and approval of the court or judge, in the office of the clerk of the court for the county in which the letters testamentary or of administration were granted, the clerk must enter a minute of the order referring the matter in controversy to the person so selected; or if the parties consent, a reference may be had in the court; and the report of the referee, if confirmed, establishes or rejects the claim the same as if it had been allowed or rejected by the executor or administrator and judge.

Sec. 1628. The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control as in other cases of reference. The court or judge may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the order or judgment thereon shall be as valid and effectual, in all respects, as if the same had been rendered in an action commenced by ordinary process.

Sec. 1629. When a judgment is recovered with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

Sec. 1630. If the executor or administrator is a creditor of the decedent, his claim duly authenticated by affidavit must be presented for allowance or rejection to the judge, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. If the claimant recover no judgment, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court or judge.

Sec. 1631. If an executor or administrator neglects, for two months after his appointment, to give notice to creditors, as prescribed by this Chapter, the court or judge must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment.

Sec. 1632. At the same time at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court or judge, and from time to time thereafter he must present a statement of claims subsequently presented to him, if so required by the court or judge. In all such statements he must designate the names of the creditors, the nature of each claim when it became due, or will become due, and whether it was allowed or rejected by him.

Sec. 1633. If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court or judge, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid.

CHAPTER VII.

SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

Article I. Sales in General.
" *II. Sales of Personal Property.*
" *III. Summary Sales of Mines and Mining Interests.*
" *IV. Sales of Real Estate, Interests Therein, and Confirmation Thereof.*
" *V. Mortgages and Leases of Real Estate.*

ARTICLE I.

SALES IN GENERAL.

Section 1637. Personal estate first chargeable. Real estate, when sold.
" *1638. Money may be borrowed.*
" *1639. No sales valid except by order of District Court.*
" *1640. Applications for orders of sale.*
" *1641. But one petition, order, and sale must be had when it is possible to do so.*

Sec. 1637. All the property of the decedent shall be chargeable with the payment of the debts of the deceased, the expenses of the administration, and the allowance to the family, except as otherwise provided in this Code and in the Civil

Code. And the said property, personal and real, may be sold, as the court or judge may direct, in the manner prescribed in this Chapter. There shall be no priority as between personal and real property for the above purposes.

Sec. 1638. In all cases the executor or administrator of an estate, instead of selling the property of the estate to pay the charges and demands against the same, may borrow money at the lowest rate of interest at which it may be had, and for such length of time the court or judge may allow, to pay such claims, when it shall be made to appear to the court or judge, by petition and evidence, that an immediate sale of the property of the estate will be detrimental to the heirs, devisees, legatees, or other persons having an interest therein; and in such case the estate shall be chargeable with the payment of the sum so borrowed and interest thereon. Such petition may be by the executor or administrator, or by any one of the heirs of the deceased, or other person interested in the estate. Notice shall be given as follows: If by the executor or administrator, to all the heirs, devisees, legatees residing in the State; and if by any heir, devisee or legatee, to the administrator or executor, and to all other heirs, devisees and legatees residing in the State. The notice must be given by personal service on all persons residing in the State. If any persons interested in the estate, as above mentioned; are not residents of or cannot be found within the State, then notice must be given by publication in some newspaper published in the county at least once a week for four successive weeks.

Sec. 1639. No sale of any property of an estate of a decedent is valid unless made under order of the District Court or a judge thereof, except as otherwise provided in this Chapter. All sales must be made under oath reported to and confirmed by the court or judge before the title to the property sold passes.

Sec. 1640. All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale.

Sec. 1641. When it appears to the court or judge that the estate is insolvent, or that it will require a sale of all the property of the estate of every character, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in the case of perishable property, which may be sold as provided in Section 1644. The court or judge, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required by Section 1658.

ARTICLE II.

SALES OF PERSONAL PROPERTY.

Section 1644. Perishable and depreciating property to be sold.
" *1645. Order to sell personal property.*
" *1646. Partnership interests and choses in action, how sold.*
" *1647. Order of sale what to direct, what to be first sold.*
" *1648. Sale of personal property.*

Sec. 1644. At any time after receiving letters, the executor or administrator, or special administrator, may apply to the court or judge and obtain an order to sell perishable and other personal property liable to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible for the property, unless, after making a sworn return and on a proper showing, the court or judge shall approve the sale.

Sec. 1645. If claims against the estate have been allowed, and a sale of property is necessary for their payment, or for the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appears for the best interests of the estate, he may, at any time after filing the inventory, in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not.

Sec. 1646. Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interests in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interests of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.

Sec. 1647. If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the court or judge must so direct.

Sec. 1648. The sale of personal property must be made at public auction, after public notice given for at least ten days by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale and a brief description of the property to be sold, unless for good reason shown the court or a judge thereof orders a private sale or a shorter notice. Public sales of such property must be had at the court house door or at the residence of the decedent, or at some other public place; but no sale shall be made of any personal property which is not present at the time of sale, and the sale must be for cash, unless the court or judge otherwise order.

ARTICLE III.

SUMMARY SALES OF MINES AND MINING INTERESTS.

Section 1650. Mines may be sold, how.
" *1651. Petition for sale, who may file and what to contain.*
" *1652. Order to show cause, how made and on what notice.*
" *1653. Order of sale, when and how made.*
" *1654. Further proceedings to conform to Articles II. and IV.*

Sec. 1650. When it appears from the inventory that the estate consists, in whole or in part, of mines or interests in mines, or of shares, interests, or stocks in a mining corporation, such mines, interests, stocks or shares may be sold under the order of the court or judge.

Sec. 1651. The executor or administrator, or any heir at law, or creditor of the estate, or any partner or member of any mining company or corporation, in which interests or shares are held or owned by the estate, may file in the court a petition, in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interests or shares which it is desired to sell, and particularly the condition and situation of the mines or mining interests, or of the mining company or corporation, in which such interests or shares are held, and the grounds upon which the sale is asked to be made.

Sec. 1652. Upon the presentation of such petition, the court or judge must make an order directing all persons interested to appear before such court or judge, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mine, mining interests, shares or stocks, as set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least four successive weeks in such newspaper as the court or judge shall specify. If all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with.

Sec. 1653. If, upon hearing the petition, it appears to the satisfaction of the court or judge that it is to the interest of the estate that such mining property or interests of the estate should be sold, or that an immediate sale is necessary in order to secure the just rights or interests of the mining partners or tenants in common, such court or judge must make an order authorizing the executor or administrator to sell such mining interests, mines or shares, as herein provided.

Sec. 1654. After the order of sale is made, all further proceedings for the sale of such mining property, and for the notice, report, and confirmation thereof, must be in conformity with the provisions of Articles II. and IV., of this Chapter.

ARTICLE IV.

THE SALE OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATION THEREOF.

Section 1657. To sell real estate, when.
" 1658. Verified petition for sale, what it may contain and to what it may refer.
" 1659. Order to persons interested to appear.
" 1660. Copy to be served, assent given, or publication made.
" 1661. Hearing after proof of service. Presentation of claim.
" 1662. Administrator, executor, and witnesses may be examined.
" 1663. To sell real estate, or any part, when.
" 1664. Order of sale, when to be made.

Section 1665. *What the order of sale must contain. May be at public or private sale.*
“ 1666. *Interested persons may apply for order of sale. Form of petition.*
“ 1667. *Notice of sale.*
“ 1668. *Time and place.*
“ 1669. *Private sale of real estate, how made and notice. Bids, when and how received.*
“ 1670. *Ninety per cent. of appraised value must be offered.*
“ 1671. *Purchase money on sale on credit, how secured.*
“ 1672. *Hearing and setting aside sale, and when resale may be ordered.*
“ 1673. *May file objections, when and who.*
“ 1674. *When order of confirmation is to be made and when not.*
“ 1675. *Conveyances.*
“ 1676. *Order of confirmation, what to state.*
“ 1677. *Sale may be postponed.*
“ 1678. *Notice of postponement.*
“ 1679. *Where payment of debts, etc., provided for by will.*
“ 1680. *Sale without order. May require security.*
“ 1681. *Where provision by will insufficient.*
“ 1682. *Estate subject to debts, etc.*
“ 1683. *Contribution among legatees.*
“ 1684. *Contract for purchase of lands may be sold, how.*
“ 1685. *Conditions of sale.*
“ 1686. *Purchaser to give bond.*
“ 1687. *Executor to assign contract.*
“ 1688. *Sales by executor or administrators of lands under mortgage or lien.*
“ 1689. *The holder of the mortgage or lien may purchase the lands. His receipt to the amount of his claim a valid payment.*
“ 1690. *Administrator and executor liable for misconduct in sale.*
“ 1691. *Fraudulent sales.*
“ 1692. *Limitation of actions for vacating sale, etc.*
“ 1693. *To what cases preceding section not to apply.*
“ 1694. *Account of sale to be returned.*
“ 1695. *Executor, etc., not to be purchaser.*

Sec. 1657. When a sale of the property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies, the executor or administrator may also sell any real as well as personal property of the estate for that purpose, upon the order of the court or judge; and an application for the sale of real property may also embrace the sale of personal property.

Sec. 1658. To obtain such order for the sale of real property, he must present a verified petition to the court or judge, setting forth the amount of personal property that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest and the condition and value thereof; and the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the order.

Sec. 1659. If it appears to the court or judge, from such petition, that it is necessary to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed and an order thereupon made, directing all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary.

Sec. 1660. A copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee or devisee, or heir of the decedent, provided they are residents of the county, at least ten days before the time appointed for hearing the petition, or be published four successive weeks in such newspaper in the county as the court or judge shall direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time.

Sec. 1661. The court or judge, at the time appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate, who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon at the hearing.

Sec. 1662. The executor, administrator and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the court or judge in the same manner and with like effect as in other cases.

Sec. 1663. If it appears necessary to sell a part of the real estate, and that by a sale thereof the residue of the estate, real or personal, or some specific part thereof, would be greatly injured, or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such character, with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interest of all concerned that the same should be sold, the court or judge may authorize the sale of the whole estate, or of any part thereof necessary and for the best interest of all concerned.

Sec. 1664. If the court or judge is satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this Article, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition, as the court or judge shall judge necessary or beneficial.

Sec. 1665. The order of the sale must describe the lands to be sold and the terms of sale, which may be for cash, or on a credit not exceeding one year, payable in gross or in installments, with interest, as the court or judge may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court or judge utherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts or legacies, the court or judge must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court or judge, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court or judge may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall deem to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order, and as directed therein, he may be compelled to sell, by order of the court or judge, made on motion, after due notice, by any party interested.

Sec. 1666. If the executor or administrator neglects to apply for an order of sale when it is necessary, any person may make application therefor, in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator, before the hearing. The petition of such applicant must contain as many of the matters set forth in Section 1658 as he can ascertain, and the order of sale must fix the period of time within which the executor or administrator must make the sale.

Sec. 1667. When a sale is ordered, and is to be made at public auction, notice of the time and place must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court or judge may direct for three weeks successively next before the sale; the lands and tenements to be sold must be described with common certainty in the notice.

Sec. 1668. Sales at public auction must be made in the county where the land is situated, but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

Sec. 1669. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county; if none, then in such paper as the court or judge may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice and before the making of the sale. If it be shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice, in which case the notice of sale, and the sale, may be made to correspond with such order.

Sec. 1670. No sale of real estate at private sale shall be confirmed by the court or judge, unless the sum offered is at least ninety per cent., of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court or judge is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

Sec. 1671. The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase money, with a mortgage on the property to secure the payment.

Sec. 1672. The executor or administrator after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk, at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the court or judge must fix the day for the hearing, of which notice thereof of at least ten days must be given by the clerk, by notices posted in three public places in the county, or by publication in a newspaper, or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing the court or judge must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the court or judge may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent. more in amount than that named in the return be made to the court in writing, by a responsible person, it is in the discretion of the court or judge to accept such offer and confirm the sale to such person, or to order a new sale.

Sec. 1673. When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon, when the return is made by the court or judge, and may produce witnesses in support of his objections.

Sec. 1674. If it appears to the court or judge that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in Section 1672 be made and accepted by the court or judge, the court or judge must make an order confirming the sale, and directing conveyances to be executed. The sale from that time is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed, must be recorded in the office of the county clerk of the county in which the land sold is situated. If after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court or judge may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

Sec. 1675. Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county clerk, either by the date of such recording; or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title or interest, other than or in addition to that of the decedent, it also passes by such conveyances.

Sec. 1676. Before an order is entered confirming the sale, it must be proved to the satisfaction of the court or judge that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

Sec. 1677. If, at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

Sec. 1678. In case of a postponement, notice thereof must be given, by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

Sec. 1679. If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient.

Sec. 1680. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court or judge, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales, as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale be confirmed by the court or judge.

Sec. 1681. If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this Chapter.

Sec. 1682. The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration and family expenses, in proportion to the value or amount of the several legacies or devises, but specific devises or legacies are exempt from such liability, if it appears to the court or judge necessary to carry into effect the intention of the testator, and there is other sufficient estate.

Sec. 1683. When an estate given by will has been sold for the payment of debts or expenses, all the devisees or legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the court or judge, when distribution is made, must, by order for that purpose, settle the amount of the several liabilities, and order the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution.

Sec. 1684. If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for the purpose as are prescribed in this Chapter for the sale of lands of which he died seized, except as hereinafter provided.

Sec. 1685. The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the court or judge until the purchasers execute a bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract with such sureties as the court or judge shall approve.

Sec. 1686. The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons so entitled, against all demands, costs, charges, and expenses by reason of any covenant or agreement contained in such contract.

Sec. 1687. Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale; and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have if he were living.

Sec. 1688. When any sale is made by an executor or administrator, pursuant to provisions of this Chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase money has been actually so applied.

No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court or judge otherwise directs.

Sec. 1689. At any sale under order of the court or judge, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment *pro tanto*. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court, or the clerk thereof, an amount sufficient to pay such expenses.

Sec. 1690. If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

Sec. 1691. Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this Chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.

Sec. 1692. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this Chapter, can be maintained by any heir or other claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based.

Sec. 1693. The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability.

Sec. 1694. When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the court or judge within thirty days thereafter, an account of sales, verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue, or such revocation should not be made.

Sec. 1695. No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.

ARTICLE V.

MORTGAGES AND LEASES OF REAL ESTATE IN CERTAIN CASES.

Section 1700. Judge may empower administrator to mortgage or lease real estate.
" *1701. Manner of obtaining authority to mortgage.*
" *1702. Obtaining order to lease.*

Sec. 1700. Whenever it appears to the court or judge, to be for the advantage of the estate to raise money by a mortgage of the real property of the decedent, or any part thereof, or to make a lease of said realty, or any part thereof, the court or judge, as often as occasion therefor shall arise in the administration of any estate, may, on a petition, notice, and hearing as provided for in this article, authorize, empower and direct the executor or administrator to mortgage or lease such real estate or any part thereof.

Sec. 1701. To obtain an order to mortgage such realty the proceedings to be taken and the effect thereof must be as follows:

1. The executor, administrator or any person interested in the estate, may file a verified petition showing: The particular purpose or purposes for which it is proposed to make the mortgage, which shall be either to pay the debts, legacies, or charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting on said realty, or some part thereof. A statement of the debts, legacies, charges of administration, liens or mortgages to be paid, reduced, extended, or renewed, as the case may be. The advantage that may accrue to the estate from raising the required money by mortgage, or providing for the payment, reduction, extension, or renewal of the subsisting liens, or mortgages, as the case may be. The amount to be raised, with a general description of the property proposed to be mortgaged; and, the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner.

2. Upon filing such petition, an order must be made by the court or judge, requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than four nor more than ten weeks thereafter, then and there to show cause why the realty (briefly indicating it), or some part thereof, should not be mortgaged the amount mentioned in the petition, stating such amount, or such lesser amount as to the court or judge shall seem meet, and referring to the petition on file for further particulars.

3. The order to show cause may be personally served on the persons interested in the estate, at least ten days before the time appointed for hearing the petition, or it may be published for four successive weeks in a newspaper of general circulation published in the county.

4. At the time and place appointed in the order to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), having first received satisfactory proof of personal service, or publication of the order to show cause, must proceed to hear the petition, and any objections that may be filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify in the same manner, and with like effect, as in other cases; and if after a full hearing the court or judge is satisfied that it will be for the advantage of the estate to mortgage the whole or any portion of the real estate, an order must be made authorizing, empowering and directing the executor or administrator to make such mortgage. The order may direct that a lesser amount than that named in the petition be borrowed, and may prescribe the maximum rate of interest, and period of the loan, and require that the interest, and the whole or any part of the principal, be paid, from time to time, out of the whole estate or any part thereof, and that any buildings on the premises to be mortgaged shall be insured for further

security of the lender, and the premiums paid from such income.

5. After the making of the order to mortgage, the executor or administrator shall execute, acknowledge and deliver a mortgage of the premises for the amount and period specified in the order, setting forth in the mortgage that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county clerk of every county in which the incumbered land or any portion thereof lies. No bond, note, or other personal obligation shall be given with the mortgage or created thereby.

6. Every mortgage so made shall be effectual to mortgage and hypothecate all the right, title, interest and estate which the decedent had in the premises described therein, at the time of his death, and any right, title, or interest in said premises, acquired by his estate, by operation of law, or otherwise, since the time of his death. Jurisdiction of the court to administer the decedent's estate shall be effectual to vest such court and judge with jurisdiction to make the order for the mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate the same, or the mortgage given in pursuance thereof; and the mortgagee, his heirs and assigns, shall have and possess the same rights and remedies on the mortgage, as if it had been made by the decedent prior to his death. Upon any foreclosure, if the proceeds of the incumbered property are insufficient to pay the mortgage, no judgment or claim for any deficiency of such proceeds, to satisfy the mortgage, or the costs, or expenses of sale, shall be had or allowed, except in cases where the mortgage was given to pay, reduce, extend or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate. The part of the indebtedness remaining unsatisfied must be classed and paid with other demands against the estate, as provided in Article III., Chapter X., of Title XI., Part III., of this Code, with respect to mortgages subsisting at the time of death.

Sec. 1702. To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows:

1. The executor, administrator or any person interested in the estate, may file a verified petition showing: The advantage or advantages that may accrue to the estate from giving a lease. A general description of the property proposed to be leased. The term, rental and general conditions of the proposed lease; and, the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner.

2. Upon filing such petition an order must be made by the court or judge requiring all persons interested in the estate to appear before the court or judge at a time and place specified, not less than two nor more than four weeks thereafter; then, and there to show cause why the realty, briefly indicating it, should not be leased for the period, stating it, at the rental mentioned in the petition, stating it, and referring to the petition on file for further particulars.

3. The order to show cause may be personally served on the persons interested in the estate, at least ten days before the time appointed for hearing the petition, or it may be published for two successive weeks in a newspaper of general circulation published in the county.

4. At the time and place appointed in the order to show cause, or at such other time and place to which the hearing may be postponed, the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition and any objections that may be filed or presented thereto. Upon such hearing witnesses may be compelled to attend and testify in the same manner and with like effect as in other cases, and the court or judge, may, in its or his discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and direct that a reasonable compensation for their services, not to exceed five dollars per day, to be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to lease the whole or any portion of the real estate, an order must be made authorizing, empowering and directing the executor or administrator to make such lease. The order may prescribe the minimum rental to be received for the premises, and the period of the lease, which must in no case be longer than for five years, and may prescribe the other terms and conditions of such lease.

5. After the making of the order to lease, the executor or administrator must execute, acknowledge, and deliver a lease of the premises, for the rent, and period, and with the conditions specified in the order, setting forth in the lease that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county clerk of every county in which the leased land or any portion thereof lies.

6. Every lease so made shall be effectual to demise and let, at the rent, for the term, and upon the conditions prescribed therein, the premises described therein. Jurisdiction of the court to administer the decedent's estate shall be effectual to vest such court and judge with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee, his heirs, and assigns. No omission,

error, or irregularity in the proceedings impairs or invalidates the same, or the lease made in pursuance thereof.

CHAPTER VIII.

THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND THE MANAGEMENT OF ESTATES.

Section 1705. Executors to take possession of the entire estate.
" *1706. Executors may sue and be sued for recovery of property.*
" *1707. May maintain actions for waste, conversion, and trespass.*
" *1708. Executor and administrator may be sued for waste or trespass of decedent.*
" *1709. Surviving partner to settle up business. Interest therein to be appraised. Account to be rendered.*
" *1710. Actions on bond of executor or administrator may be brought by another administrator.*
" *1711. What executors are not parties to actions.*
" *1712. May compound.*
" *1713. Recovery of property fraudulently disposed of by testator.*
" *1714. When executor to sue, as provided in preceding section.*
" *1715. Disposition of estate recovered.*

Sec. 1705. The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this Title.

Sec. 1706. Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by or against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.

Sec. 1707. Executors and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on or damage to the real estate of the decedent in his lifetime.

Sec. 1708. Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

Sec. 1709. When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must give a bond with sufficient sureties in favor of the executor or administrator in a sum at least equal to the value of the interest of the deceased partner in the property of the partnership. The amount of said bond must be fixed and the bond approved by the judge. In case he fails to give such bond, the court or judge may compel its execution by attachment or other proper order.

The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court or judge may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. The surviving partner is a trustee of the estate or interest of the deceased partner in the property of the partnership, for every purpose, and the court or judge may require the surviving partner to account at any time.

Sec. 1710. An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

Sec. 1711. In actions by or against executors, it is not necessary to join those as parties to whom letters were issued but who have not qualified.

Sec. 1712. Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court or judge, may compound with him and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just and for the best interest of the estate.

Sec. 1713. When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditors all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

Sec. 1714. No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor as the court or judge shall direct.

Sec. 1715. All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the court or judge; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator.

CHAPTER IX.

THE CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.

Section 1718. Executor to complete contracts for sale of real estate.
“ *1719. Petition for executor to make conveyance, and notice of hearing.*
“ *1720. Interested parties may contest.*
“ *1721. Conveyances, when order to be made.*
“ *1722. Execution of conveyance and record thereof, how enforced.*
“ *1723. Rights of petitioner to enforce contract.*
“ *1724. Effect of conveyance.*
“ *1725. Effect of recording a copy of the order.*
“ *1726. Recording order does not supersede power of court to enforce it.*
“ *1727. Where party to whom conveyance to be made is dead.*
“ *1728. Order may direct possession to be surrendered.*

Sec. 1718. When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent if living, might be compelled to make such conveyance, the court or judge may make an order authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

Sec. 1719. On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the court or judge must appoint a time and place for hearing the petition, and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this State as he may designate.

Sec. 1720. At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satistacfory proof by affidavit or otherwise, of the due publication of the notice, the court or judge must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court or judge may examine, on oath, the petitioner and all who may be produced before him for that purpose.

Sec. 1721. If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court or judge is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, an order authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, entered on the minutes of the court and recorded.

Sec. 1722. The executor or administrator must execute the conveyance according to the directions of the order, a certified copy of which must be recorded with the deed in the office of the county clerk of the county where the lands lie, and is *prima facie* evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance.

Sec. 1723. If, upon hearing, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court or judge must dismiss the petition without prejudice to the right of the petitioner, who may, at any time within six months thereafter, proceed by action to enforce a specific performance thereof.

Sec. 1724. Every conveyance made in pursuance of an order as provided in this Chapter, shall pass the title to the estate contracted for, as fully as if the contracting party himself was still living, and executed the conveyance.

Sec. 1725. A copy of the order for a conveyance as provided in this Chapter, duly certified and recorded in the office of the county clerk of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the order.

Sec. 1726. The recording of the order, as provided in the preceding section, shall not prevent the court or judge making the order from enforcing the same by other process.

Sec. 1727. If the person entitled to the conveyance dies before the commencement of proceedings therefor under this Chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.

Sec. 1728. The order provided for in this Chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the order, when, by the terms of the contract, possession is to be surrendered.

CHAPTER X.

ACCOUNTS AND PAYMENT OF DEBTS.

Article I. Liabilities and compensation of executors.
" II. Accounting and settlements by executors and administrators.
" III. The payment of debts of the estate.

ARTICLE I.

LIABILITIES AND COMPENSATION OF EXECUTORS.

Section 1731. When executor or administrator personally liable.
" 1732. Executor to be charged with all estate, etc.
" 1733. Not to profit or lose by estate.
" 1734. Uncollected debts without fault.
" 1735. Compensation of the executor and administrator.
" 1736. Not to purchase claims against the estate.
" 1737. Executor's and administrator's commissions.

Sec. 1731. No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto especially authorized.

Sec. 1732. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit and income of the estate.

Sec. 1733. He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss if the sale has been justly made.

Sec. 1734. No executor or administrator is accountable for any debts due the decedent, if it appears that they remain uncollected without his fault.

Sec. 1735. He shall be allowed all necessary expenses in the care, management and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings, and for conducting actions in courts, and for his services such fees as provided in this Chapter; but when the decedent by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless by a written instrument, filed in the court, he renounces all claim for compensation provided by the will.

Sec. 1736. No executor or administrator shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

Sec. 1737. When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions only on all sums of money actually received by him from the sale of property of the estate, or actually disbursed by him in the settlement of the same, as follows: For the first thousand dollars at the rate of seven per cent.; for all above that sum not exceeding ten thousand dollars at the rate of five per cent.; for all above ten thousand dollars, not exceeding twenty thousand dollars, at the rate of four per cent.; and for all above twenty thousand dollars, at the rate of two per cent. If there be more than one executor, only one commission must be allowed. The same commissions must be allowed to administrators. In all such cases further allowance may be made as the court or judge may deem just and reasonable for any extraordinary services. The total amount of such extra allowance must not exceed the total amount of commission allowed by this section.

ARTICLE II.

ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

Section 1740. Exhibit of receipts and disbursements and claims allowed.

" 1741. Citation to account.

Section 1742. Petition for citation to render final or other account.
" *1743. Citation to account on application.*
" *1744. Objections to account, who may file.*
" *1745. Attachment for not obeying citation.*
" *1746. To render accounts at the expiration of term.*
" *1747. Executor to account after his authority revoked.*
" *1748. Revoking authority of executor, when.*
" *1749. To produce and file vouchers, which may remain in court.*
" *1750. Vouchers for items less than twenty dollars, when accepted.*
" *1751. Day of settlement to be appointed, and notice thereof.*
" *1752. Final settlement, partition and distribution made at same time.*
" *1753. Interested party may file exceptions to account.*
" *1754. All matters may be contested by the heirs. Hearing.*
" *1755. Settlement of accounts to be conclusive, when and when not.*
" *1756. Proof of notice of settlement of accounts.*
" *1757. Sale of personal property.*
" *1758. Moneys invested by order of court.*

Sec. 1740. Six months after his appointment, and at any time when required by the court or judge, either upon his own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court or judge, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs.

Sec. 1741. If the executor or administrator fails to render an exhibit for six months after his appointment, the court or judge must cause a citation to be issued requiring him to appear and render it.

Sec. 1742. Any person interested in any estate may, at any time before the final settlement of accounts, present his petition to the court or judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made.

Sec. 1743. If the court or judge is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear, at some day to be named in the citation, and render an exhibit as prayed for.

Sec. 1744. When an exhibit is rendered by an executor or administrator, any person interested may appear, and by objections in writing, contest any account or statement therein contained. The court or judge may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.

Sec. 1745. If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him, and such exhibit enforced, or his letters may be revoked, in the discretion of the court or judge.

Sec. 1746. Within thirty days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account, the court or judge must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment; but no attachment must issue unless a citation has been first issued, served and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account must exhibit all debts which have been presented and allowed during the period embraced in the account.

Sec. 1747. When the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court or judge, at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator.

Sec. 1748. If the executor or administrator resides out of the county, or absconds or conceals himself so that the citation cannot be personally served, and neglects to render an account, within thirty days after the time prescribed in this Article, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked.

Sec. 1749. In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reasons cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

Sec. 1750. On the settlement of his account he may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate, and if, upon such settlement of accounts it appear that debts against the deceased have been paid without the affidavit and allowance prescribed by statute or Sections 1614, 1615 and 1616, of this Code, and it shall be proven by competent evidence to the satisfaction of the court or judge that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set off, and that the estate is solvent, it shall be the duty of the said court or judge to allow the said sums so paid in the settlement of said accounts.

Sec. 1751. When any account is rendered for settlement the court or judge may appoint a day for the settlement thereof; the clerk must thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. The court or judge may order such further notice to be given as may be proper.

Sec. 1752. If the account mentioned in the preceding section be for final settlement, and a petition for the final distribution of the estate be filed with said accounts, the notice of the settlement must state those facts, which notice must be given by posting or publication as the court or judge may direct, and for such time as may be ordered. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had, without further notice of proceedings.

Sec. 1753. On the day appointed, or any subsequent day to which the hearing may be postponed by the court or judge, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

Sec. 1754. All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making an order of sale, may be contested by the heirs for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court or judge may appoint one or more referees to examine the accounts, and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

Sec. 1755. The settlement of the account and the allowance thereof by the court or judge, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is *prima facie* evidence of its correctness.

Sec. 1756. The account must not be allowed by the court or judge until it is first proved that notice has been given as required by this Chapter, and the order must show that such proof was made to the satisfaction of the court or judge, and is conclusive evidence of the fact.

Sec. 1757. Whenever it appears to the court or judge on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court or judge may order the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance.

Sec. 1758. Pending the settlement of any estate, on the petition of the executor, administrator or any one or more of the heirs, legatees or devisees, the court or judge may order any moneys in the hands of any executor or administrator to be loaned, for such length of time as may be requested by the party petitioning and the court or judge may think to the interests of the estate; and on such security as the court or judge thereof may approve of, which shall not be a period of time to exceed one year at any one time; but no money shall be loaned, except on United States, State, county or approved municipal bonds or real estate mortgage (and then only to the extent of one-half of the market value of the real estate so loaned upon the value of said property, to be estimated by the judge). The term "real estate" as herein used, does not include mining property. Such order can only be made after notice in the manner prescribed by the court or judge.

ARTICLE III.

THE PAYMENT OF DEBTS OF THE ESTATE.

Section 1761. Order in which debts to be paid.
" *1762. Where property insufficient to pay mortgage.*
" *1763. Estate insufficient, a dividend to be paid.*
" *1764. Funeral expenses and expenses of last sickness.*
" *1765. Order for payment of debts and discharge of the executor or administrator.*
" *1766. Provision for disputed and contingent claims.*
" *1767. After order for payment of debts, executor personally liable to creditors.*

Section 1768. Claims not included in order for payment of debts, how disposed of.
" *1769. Order for payment of legacies and extension of time.*
" *1770. Final account, when to be made.*
" *1771. Neglect to render final account, how treated.*

Sec. 1761. The debts of the estate, subject to the provisions of Section 1344, must be paid in the following order:

1. Funeral expenses.
2. The expenses of the last sickness.
3. Debts having preference by the laws of the United States, or of the State.
4. Judgments rendered against the decedent in his lifetime, and mortgages in the order of their date.
5. All other demands against the estate.

Sec. 1762. The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property is insufficient to pay the mortgage, the part remaining unsatisfied must be classed with the other demands against the estate.

Sec. 1763. If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim, and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.

Sec. 1764. The executor or administrator, as soon as he has sufficient funds in his hands, may pay the funeral expenses and expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this Article, the payment has been ordered by the court or judge.

Sec. 1765. Upon the settlement of the accounts of the executor or administrator, as required in this Chapter, the court or judge must make an order for the payment of the debts, as circumstances of the estate require. If there is not sufficient funds in the hands of the executor or administrator, the court or judge must specify in the order the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account and the executor or administrator is entitled to his discharge on producing and filing the necessary vouchers and proofs, showing that such payments have been made, and that he has fully complied with the order of the court or judge.

Sec. 1766. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered.

Sec. 1767. When an order is made by the court or judge, for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the court, in favor of each creditor, and the same proceedings may be had under such execution as under execution in other cases. The executor or administrator is liable therefor on his bond to each creditor.

Sec. 1768. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor, whose claim was not included in the order for payment, has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors as prescribed in Section 1611, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to, had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent, and did not become absolute ten months before such day.

Sec. 1769. If the whole of the debts have been paid by the first distribution, the court or judge must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next Chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court or judge must give such extension of time as may be reasonable, for the final settlement of the estate.

Sec. 1770. At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and pray a settlement of his administration.

Sec. 1771. If he neglects to render his account, the same proceedings may be had as prescribed in this Chapter in regard to the first account to be rendered by him, and all the provisions of this Chapter relative to the last mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

CHAPTER XI.

THE PARTITION, DISTRIBUTION AND FINAL SETTLEMENT OF ESTATES.

Article I. Partial distribution prior to final settlement.
" II. Distribution on final settlement.
" III. Distribution and partition.
" IV. Agents for absent interested parties. Discharge of executor or administrator.
" V. Settlement of accounts of trustees after distribution of estate.

ARTICLE I.

PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

Section 1774. Payment of legacies upon giving bonds.
" 1775. Notice of application for legacies.
" 1776. Executor or other person may resist application.
" 1777. Order prayed for to require bond, which must be given. May order whole or part of share to be delivered. Where partition is necessary, how made. Costs.
" 1778. Order for payment of bond, and suit thereon.
" 1779. Application for distribution.

Sec. 1774. At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee, may present his petition to the court or judge for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.

Sec. 1775. Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

Sec. 1776. The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself.

Sec. 1777. If, at the hearing, it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court or judge must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee, or devisee obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court or judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled.

2. The executor or administrator to deliver to the heir, legatee, or devisee, the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally among them.

Sec. 1778. When any bond has been executed and delivered under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court or judge for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court or judge, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

Sec. 1779. At any time after the lapse of one year from the issuance of letters testamentary, or of administration, any heir, devisee, or legatee may present his or her petition to the court or judge for the distribution of the net proceeds of the share of the said estate to which he or she will be entitled. Notice of the application must be given, as required by Section 1775. The executor or administrator, or any other person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself. If at the hearing it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court or judge must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, devisee, or legatee, obtaining such order, before receiving his share or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court or judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required,

of his proportion of the debts due from the estate, not exceeding the amount or portion of the proceeds of the estate which he has received; *Provided*, that where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court or judge is satisfied that no injury can result to the estate, the court or judge may dispense with the bond.

2. The executor or administrator to deliver to the heir, legatee, or devisee the proceeds of the estate to which he may be entitled, or only a part thereof, designating it. If, in the opinion of the court or judge, it be necessary, in order to ascertain the proceeds that any or all of the heirs, legatees, or devisees may be entitled, that the interest of any heir, legatee, or devisee in one or more pieces or parcels of property of the estate shall be determined or ascertained, the court or judge may suspend proceedings and direct the petitioner or petitioners to take proceedings under Section 1782 of this Code to ascertain the interest the petitioner or petitioners will have under the will in any piece or parcel of property. The order must describe the property in relation to which proceedings are to be taken. Whenever any bond has been executed and delivered, proceedings upon any such bond may be taken under Section 1778. The cost of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally between them.

ARTICLE II.

DISTRIBUTION ON FINAL SETTLEMENT.

Section 1782. Proceedings in the nature of an action to determine heirship.
" *1783. Appearance of parties.*
" *1784. Trial and judgment.*
" *1785. Distribution of estate, how made and to whom.*
" *1786. What the decree must contain, and is final.*
" *1787. Distribution when decedent was not a resident of this State.*
" *1788. Decree to be made only after notice.*
" *1789. No distribution till taxes on personal property are paid.*

Sec. 1782. Any person claiming to be heir to the deceased, or entitled to the distribution in whole or in a part of an estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court or judge to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made. Upon the filing of such petition, the court or judge must make an order directing service of notice to all persons interested in said estate to appear and show cause, on a day to be therein named, not less than sixty days nor more than four months from the date of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate, in the course of the administration of the same, up to the time of the making of said order, and such other persons as the court or judge may direct, and also a description of the real estate whereof said deceased died seized or possessed, so far as known, described with certainty to a common intent; and requiring said persons and all persons named or not named, having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said court or judge, which notice shall be served in the same manner as a summons in a civil action; upon proof of which service, by affidavit or otherwise, to the satisfaction of the court or judge, the court or judge shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate, and of the title and ownership of said property. The court or judge must enter an order establishing proof of the service of such notice.

Sec. 1783. All persons appearing within the time limited, must file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, entry of which appearance shall be made in the minutes of the court and in the register of proceedings of said estate. And the court or judge shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid. At any time within twenty days after the date of the order of the court or judge establishing proof of service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the court or judge may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of them do not reside within the county, then service of such copy of said complaint shall be made upon the clerk of said court for them, and the clerk shall forthwith mail the same to the address of such party or attorney as may have left with said clerk his postoffice address. Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this Code provided in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the Supreme Court; and the provisions in this Code contained regulating the mode of proceddure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exception, and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto; *Provided, however*, that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of.

Sec. 1784. The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint must in all subsequent proceedings be treated as the plaintiff therein, and all other parties so appearing must be treated as the defendants in said proceedings, and all such defendants shall set forth in their respective answers, the facts constituting their claim of heirship, ownership, or interest in said estate, with such particularity as the court or judge may require, and serve a copy thereof on the plaintiff. Evidence in support of all issues may be taken orally or by deposition, in the same manner as provided in civil actions. Notice of the taking of such depositions shall be served only upon the parties or the attorneys of the parties so appearing in said proceeding. The court or judge shall enter a default of all persons failing to appear, or plead, or prosecute, or defend their rights as aforesaid; and upon the trial of the issues arising upon the pleadings in such proceeding, the court or judge shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof, and the final determination of the court or judge thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate of said deceased. The cost of the proceedings under the last three sections shall be apportioned in the discretion of the court or judge. In such proceeding, the court or judge may appoint an attorney for any minor not having a guardian. Nothing in the last three sections shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of Sections 1782, 1783 and 1784, but where the questions shall have been litigated under the provisions of these sections, the determination thereof, as therein provided, shall be conclusive in the distribution of said estate.

Sec. 1785. Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court or judge, must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of the administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs-at-law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution; and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court or judge, and included in the order; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

Sec. 1786. In the order the court or judge must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal.

Sec. 1787. Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this State, leaving a will which has been duly proved or allowed in the State of his residence, and an authenticated copy thereof has been admitted to probate in this State, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this State should be delivered to the executor or administrator in the State or place of his residence, the court or judge may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court or judge, is a full discharge of the executor or administrator with the will annexed, in this State, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court or judge.

Sec. 1788. The order may be made on the petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the court or judge may direct, and for such time as may be ordered. If partition be applied for as provided in this Chapter, the order of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed.

Sec. 1789. Before any order of distribution of an estate is made, the court or judge must be satisfied, by the oath of the executor or administrator, or otherwise, that all State, county, and municipal taxes, legally levied upon personal property of the estate, have been fully paid.

ARTICLE III.

DISTRIBUTION AND PARTITION.

Section 1791. *Estate in common. Commissioners.*
" 1792. *Partition and notice thereof, and the time of filing petition.*
" 1793. *Estate in different counties, how divided.*
" 1794. *Partition may be made, although some of the heirs, etc., have parted with their interest.*
" 1795. *Shares to be set out by metes and bounds.*
" 1796. *Whole estate may be assigned to one, in certain cases.*
" 1797. *Payments for equality of partition, by whom and how.*
" 1798. *Estate may be sold.*
" 1799. *To give notice to all persons and guardians before partition. Duties of commissioners.*
" 1800. *To make report, and partition to be recorded.*
" 1801. *When commissioners to make partition are not necessary.*
" 1802. *Advancements made to heirs.*

Sec. 1791. When the estate, real or personal, assigned by the order of distribution to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court or judge deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed by the same rules as if three were appointed.

Sec. 1792. Such partition may be ordered and had in the District Court on the petition of any person interested. But before commissioners are appointed, or partition ordered by the court or judge, as directed in this Chapter, notice thereof must be given to all persons interested who reside in this State, or to their guardians, and to the agents, attorneys, or guardians, if any in this State, of such as reside out of this State, either personally or by public notice, as the court may direct. The petition may be filed, attorneys, guardians and agents appointed, and notice given at any time before the order of distribution, but the commissioners must not be appointed until the order is made distributing the estate.

Sec. 1793. If the real estate is in different counties, the court or judge may, if deemed proper, appoint commissioners for all, or different commissioners for each county. The estate in each county must be divided separately among the heirs, legatees, or devisees, as if there was no other estate to be divided; but the commissioners first appointed must, unless otherwise directed by the court or judge, make division of such real estate wherever situated within this State.

Sec. 1794. Partition or distribution of the real estate may be made as provided in this Chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

Sec. 1795. When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

Sec. 1796. When the real estate cannot be divided without prejudice or inconvenience to the owners, the court or judge may assign the whole to one or more of the parties entitled to share therein, who will accept it, always preferring the males to the females, and among children, preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the minority of such party, then to the satisfaction of his guardian; and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court or judge, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court or judge, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is assigned.

Sec. 1797. When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court or judge until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

Sec. 1798. When it appears to the court or judge, from the commissioner's report that it cannot otherwise be fairly divided and should be sold, the court or judge may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed, in the same manner and under the same requirements provided in Article IV, Chapter 7, of this title.

Sec. 1799. Before any partition is made or any estate divided, as provided in this Chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

Sec. 1800. The commissioners must report their proceedings, and the partition agreed upon by them, to the court or judge, in writing, and the court or judge may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the order of partition made thereon, attested by the clerk under the seal of the court, must be recorded in the office of the county clerk of the county where the lands lie.

Sec. 1801. When the court or judge makes an order assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is made, or some of them, request that such partition be made.

Sec. 1802. All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the court or judge, and must be specified in the order assigning and distributing the estate; and the final order of the court or judge, or in case of appeal, of the Supreme Court, is binding on all parties interested in the estate.

ARTICLE IV.

AGENTS FOR ABSENT OR INTERESTED PARTIES. DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

Section 1805. Court may appoint agent to take possession for absentees.
" *1806. Agent to give bond, and his compensation.*
" *1807. Unclaimed estate, how disposed of.*
" *1808. When real and personal property of absentee to be sold.*
" *1809. Liability of agent on his bond.*
" *1810. Certificate to claimant.*
" *1811. Final settlement, decree, discharge.*
" *1812. Discovery of property.*

Sec. 1805. When any estate is assigned or distributed by an order of the court or judge, as provided in this Chapter, to any person residing out of, and having no agent in this State, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court or judge may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the distribution.

Sec. 1806. The agent must execute a bond to the State of Montana, to be approved by the court or judge, conditioned that he shall faithfully manage and account for the estate. The court or judge appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

Sec. 1807. When the personal property remains in the hands of the agent unclaimed for a year, and it appears to the court or judge that it is for the benefit of those interested, it shall be sold under the order of the court or judge, and the proceeds, after deducting the expenses of the sale allowed by the court or judge, must be paid into the State treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the State Auditor, and the other in the court.

Sec. 1808. The agent must render the court or judge appointing him, annually, an account, showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what.

2. The income derived therefrom.

3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid.

4. The expenses incurred in the care, protection, and management thereof, and whether paid or unpaid. When filed, the court or judge may examine witnesses and take proofs in regard to the account, and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court or judge may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase money to be deposited in the State treasury.

Sec. 1809. The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the paoceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

Sec. 1810. When any person appears and claims the money paid into the treasury, the court or judge making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under seal; and upon the presentation of the certificate to him, the State Auditor must draw his warrant on the treasurer for the amount.

Sec. 1811. When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court or judge, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court or judge must make an order discharging him from all liability to be incurred thereafter.

Sec. 1812. The final settlement of an estate, as in this Chapter provided, shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should be again issued.

ARTICLE V.

SETTLEMENT OF ACCOUNTS OF TRUSTEES AFTER DISTRIBUTION OF ESTATE.

Section 1815. Court not to lose jurisdiction by distribution.
" 1816. Compensation.
" 1817. Appeal.

Sec. 1815. Where any trust has been created by or under any will to continue after distribution, the District Court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust. And any trustee created by any will, or appointed to execute any trust created by any will, may from time to time, pending the execution of his trust, or may at the termination thereof, render and pray for the settlement of his accounts as such trustee before the District Court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee, or in the case of his death, his legal representatives, shall for that purpose present to the court or judge his petition setting forth his accounts in detail; and upon filing thereof, the court or judge shall fix a day for the hearing, and a citation shall be issued citing all the beneficiaries of the said trust to appear and show cause why the account should not be allowed; such citation shall be personally served upon all the beneficiaries in the State, in the manner provided for the service of summons in civil actions, and shall be served upon all the beneficiaries, who shall appear by affidavit to be absent from the State, by publication in such manner as the court or judge may order, for not less than two months. And any such trustee may, in the discretion of the court or judge, upon application of any beneficiary of the trust, be ordered to appear and render his account, after being cited by service of citation as provided for the service of summons in civil cases. Upon the filing of the account so ordered the same proceedings for the hearing and settlement thereof shall be had as are hereinbefore provided.

Sec. 1816. On all such accountings the court or judge shall allow the trustee or trustees the proper expenses and such compensation for services as the court or judge may deem to be just and reasonable, and shall apportion such compensation among the trustees according to the services rendered by them respectively, and may in its discretion fix a yearly compensation for the trustee or trustees, to continue as long as the court or judge may deem proper.

Sec. 1817. From an order settling such account appeal may be taken in the manner provided for an appeal from an order settling the account of an executor or administrator. The order of the District Court, if affirmed on appeal or becoming final without appeal, shall be conclusive.

CHAPTER XII.

ORDERS, PROCESS, MINUTES, RECORDS, TRIALS AND APPEALS.

Section 1820. Orders to be entered in minutes.
" *1821. How often publication to be made.*
" *1822. Recorded order to impart notice from date of filing.*

Section 1823. *Proceeding had before court or judge.*
" 1824. *Citation, how directed and what to contain.*
" 1825. *Citation, how issued.*
" 1826. *Citation, how served.*
" 1827. *Personal notice given by citation.*
" 1828. *Citation to be served five days before return.*
" 1829. *One description of real estate, sought to be sold being published, is sufficient for all purposes.*
" 1830. *Rules of practice generally.*
" 1831. *New trials and appeals.*
" 1832. *Within what time appeal must be taken.*
" 1833. *Issues joined, how tried and disposed of.*
" 1834. *Court to try case when no jury demanded. How and what issues to be tried.*
" 1835. *Court to appoint attorney for minor or absent heirs, devisees, or legatees or creditors, when, and what compensation he is to receive.*
" 1836. *Order relative to homestead, and effect thereof.*
" 1837. *Costs, by whom paid in certain cases.*
" 1838. *Executor, etc., to be removed when committed for contempt.*
" 1839. *Service upon guardian.*
" 1840. *Termination of life estate.*
" 1841. *Clerk to make certain orders.*

Sec. 1820. Orders and judgments made by the court or judge, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered, except as otherwise provided in this Title. All orders of the court or judge must be entered at length in the minute book of the court kept for probate proceedings.

Sec. 1821. When any publication is ordered, such publication must be made daily, or otherwise as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this Title. The court or judge may, however, order a less number of publications during the period.

Sec. 1822. When it is provided in this Title that any order of the court or judge, or a copy thereof, must be recorded in the office of the county clerk, from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

Sec. 1823. All orders mentioned in this Title and all proceedings in matters of probate may be made or heard either before the court or the judge thereof in chambers, and when a jury is needed, the court or judge may order the trial to take place in court as provided in Part II., of this Code.

Sec. 1824. Citations must be directed to the person to be cited, signed by the clerk and issued under the seal of the court, and must contain:

1. The title of the proceeding.
2. A brief statement of the nature of the proceeding.
3. A direction that the person cited to appear at a time and place specified.

Sec. 1825. The citation may be issued by the clerk upon the application of any party without an order of the judge, except in cases in which such order is by the provisions of this Title expressly required.

Sec. 1826. The citation must be served in the same manner as a summons in a civil action.

Sec. 1827. When personal notice is required, and no mode of giving it is prescribed, it must be given by citation.

Sec. 1828. When no other time is specifically prescribed in this title, citations must be served at least five days before the return day thereof.

Sec. 1829. When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale or notice of petition for the confirmation thereof; it is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

Sec. 1830. Except as otherwise provided in this Title, the provisions of Part II. of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this Title.

Sec. 1831. The provisions of Part II. of this Code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this Title—apply to the proceedings mentioned in this Title.

Sec. 1832. The appeal must be taken within sixty days after the order or judgment is entered.

Sec. 1833. All issues of fact joined in probate proceedings must be tried in conformity with the requirements of Article II., Chapter II., of this Title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court or judge, as in civil actions.

Sec. 1834. If no jury is demanded, the court or judge must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court or judge, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either party may move for a new trial, upon the same grounds.

and errors, and in like manner, as provided in this Code for civil actions. If the trial of the issues joined requires the examination of an account, the court or judge must try the matter or refer it, and no jury can be called.

Sec. 1835. At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate, and confirmation thereof; settlements, partitions and distributions of estate, setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof; the court or judge may, in its or his discretion, appoint some competent attorney-at-law to represent in all such proceedings the devisees, legatees or heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the State; and those interested who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties so far as known for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court or judge, for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause, it becomes necessary, the court or judge may substitute another attorney for the one first appointed, in which case the fee must be apportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings.

Sec. 1836. When an order is made, setting apart a homestead, confirming a sale making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the county clerk of the county in which the property is situated.

Sec. 1837. When it is not otherwise prescribed in this Title, the District Court, or Supreme Court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for costs may issue out of the District Court.

Sec. 1838. Whenever an executor or administrator, or guardian is committed for contempt in disobeying any lawful order of the court or judge, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the court or judge may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor or administrator, or guardian in his stead.

Sec. 1839. Whenever an infant, insane or incompetent person has a guardian of his estate residing in this State, personal service upon the guardian of any process, notice, or order of the court or judge, concerning the estate of a deceased person in which the ward is interested, is equivalent to service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice or order to show cause which an adult or a person of sound mind might do.

Sec. 1840. If any person has died, or shall hereafter die, who at the time of his death was the owner of a life estate, which terminates by reason of the death of such person, any person interested in the property, or in the title thereto, in which such life estate was held, may file in the District Court of the county in which the property is situated, his verified petition, setting forth such facts, and thereupon, and after such notice, by publication or otherwise, as the court or judge may order, the court or judge shall hear such petition and the evidence offered in support thereof, and if, upon such hearing, it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, the court or judge shall make an order to that effect, and thereupon a certified copy of such order may be recorded in the office of the county clerk, and thereafter shall have the same effect as a final order of distribution so recorded.

Sec. 1841. The clerk, in the absence of the judge, may issue notices of the hearing for the probate of wills and letters of administration and guardianship and upon the hearing grant such letters, including letters testamentary, when no objections are made or filed; may order notices to creditors; may appoint appraisers, file and approve all bonds, file and approve claims against the estate, file and approve all accounts of executors, administrators and guardians, except final accounts, when no objections are made or filed thereto; make all orders for hearings and orders to give notice, as may be necessary in the exercise of any of the above powers. The court or judge may at any time set aside or modify any of the orders so made, and unless so set aside or modified they have the same effect as if made by the judge or court.

CHAPTER XIII.

PUBLIC ADMINISTRATOR.

Sec. 1845. The office of public administrator is provided for and defined in the Political Code, Part IV., Title II., Chapter III., Article IX.

CHAPTER XIV.

GUARDIAN AND WARD.

Article I. *Guardians of Minors.*
" II. *Guardians of Insane and Incompetent Persons.*

Article III. The Powers and Duties of Guardians.
" *IV. The Sale of Property and Disposition of Proceeds.*
" *V. Non-Resident Guardian and Wards.*
" *VI. General and Miscellaneous Provisions.*

ARTICLE I.

GUARDIANS OF MINORS.

Section 1846. Judge to appoint guardians, when, and on what petition.
" *1847. When minor may nominate guardian, when not.*
" *1848. When appointment may be made by judge, when minor is over fourteen.*
" *1849. Nomination by minors after arriving at fourteen.*
" *1850. Father or mother entitled to guardianship.*
" *1851. Minor having no father or mother.*
" *1852. Powers and duties of guardians.*
" *1853. Bond of guardian, conditions of.*
" *1854. Maintenance of minor out of income of his own property.*
" *1855. Guardian to give bond, powers limited.*
" *1856. Power of courts to appoint guardian and next friend not impaired.*

Sec. 1846. The District Court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the State and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court or judge must cause such notice as the court or judge deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor in the county as the court or judge may deem proper.

Sec. 1847. If the minor is under the age of fourteen years, the court or judge may nominate and appoint his guardian. If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court or judge, must be appointed accordingly.

Sec. 1848. If the guardian nominated by the minor is not approved by the court or judge, or if the minor resides out of the State, or if, after being duly cited by the court or judge, he neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years.

Sec. 1849. When a guardian has been appointed by the court or judge, for a minor under the age of fourteen years, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the court or judge.

Sec. 1850. The father of the minor, if living, and in case of his decease, the mother, being themselves respectively competent to transact their own business and not otherwise unsuitable, must be entitled to the guardianship of the minor. A married woman may be appointed guardian.

Sec. 1851. If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same.

Sec. 1852. Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged.

Sec. 1853. Before the order appointing any person guardian under this Chapter takes effect, and before letters issue, the court or judge must require of such person a bond to the minor with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond without being expressed therein.

1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the court or judge may order.

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody and education of the ward.

3. To render an account on oath of the property, estate and moneys of the ward in his hands and all the proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court or judge directs, and at the expiration of his trust to settle his accounts with the court or judge, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as let-

ters of administration, and the oath of the guardian must be endorsed thereon that he will perform the duties of his office as such guardian according to law.

Sec. 1854. If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the court or judge, and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian.

Sec. 1855. Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardian appointed by the court or judge, except so far as their powers and duties are legally modified, enlarged or changed by the will by which such guardian was appointed.

Sec. 1856. Nothing contained in this Chapter affects or impairs the power of any court or judge to appoint a guardian to defend the interests of any minor interested in any suit, or matter pending therein.

ARTICLE II.

GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

Section 1859. Guardians of insane and other incompetent persons.
" *1860. Appointment by judge after hearing.*
" *1861. Powers and duties of such guardians.*
" *1862. Petition for restoration to capacity.*
" *1863. Sale of dower of insane married woman.*

Sec. 1859. When it is represented to the District Court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed; and such person, if able to attend, must be produced on the hearing.

Sec. 1860. If, after a full hearing and examination upon such petition, it appear to the court or judge that the person in question is incapable of taking care of himself and managing his property, such court or judge must appoint a guardian of his person and estate, with the powers and duties in this Chapter specified.

Sec. 1861. Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

Sec. 1862. A person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the District Court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane or competent. Upon receiving the petition, the court or judge must appoint a day for a hearing before the court, and, if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in civil actions. The court or judge shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial the guardian or relative of the person so declared insane or incompetent, and, in the descretion of the court or judge, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court or judge on its own motion. If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardian of such person, if such person shall be not a minor, shall cease.

Sec. 1863. The right of dower of an insane married woman may be sold by her guardian, and the title to the real estate transferred to the purchaser, under the direction of the court or judge, in the same manner and with like effect, as the property of any insane person may be sold and transferred.

ARTICLE III.

POWERS AND DUTIES OF GUARDIANS.

Section 1866. Guardian to pay debts of ward out of ward's estate.
" *1867. Guardian to recover debts due his ward and represent him.*
" *1868. Guardian to manage his estate, maintain ward, and sell real estate.*
" *1869. Maintenance, support and education of ward, how enforced.*
" *1870. May assent to partition of real estate.*
" *1871. Guardian to return inventory of estate of ward; appraisers to be appointed; like proceedings when other property acquired.*

Section 1872. Settlements of guardians.
" *1873. Allowance of accounts to joint guardians.*
" *1874. Expenses and compensation of guardians.*

Sec. 1866. Every guardian appointed under the provisions of this Chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate, and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this Title for the sale of real estate of decedents.

Sec. 1867. Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court or judge, compound for the same and give discharge to the debtor, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose.

Sec. 1868. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate upon obtaining an order of the court or judge therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

Sec. 1869. When the guardian has advanced for the necessary maintenance, support or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court or judge, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects or refuses to furnish suitable or necessary maintenance, support or education for his ward, the court or judge may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court or judge may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

Sec. 1870. The guardian may join in and assent to a partition of the real estate of the ward, whenever such assent may be given by any person.

Sec. 1871. Every guardian must return to the court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of one hundred thousand dollars, semi-annual returns must be made to the court. The court or judge may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn and acting in the manner provided for regulating the settlement of the estate of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

Sec. 1872. The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the court or judge for settlement and allowance.

Sec. 1873. When an account is rendered by two or more joint guardians, the court or judge may, in its or his discretion, allow the same upon the oath of any of them.

Sec. 1874. Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court or judge in which his accounts are settled deems just and reasonable.

ARTICLE IV.

SALE OF PROPERTY AND DISPOSITION OF THE PROCEEDS.

Section 1877. May sell property in certain cases.
" *1878. Sale of real estate to be made upon order of court.*
" *1879. Application of proceeds of sales.*
" *1880. Investment of proceeds of sales.*
" *1881. Order for sale, how obtained.*
" *1882. Notice to next of kin, how given.*
" *1883. Copy of order to be served, published or consent filed.*
" *1884. Hearing of application.*
" *1885. Who may be examined on such hearing.*
" *1886. Costs to be awarded, to whom.*
" *1887. Order of sale, to specify what.*
" *1888. Bond before selling.*
" *1889. All proceedings for sales of property by guardians to conform to Chapter VII., of this Title.*

Section 1890. Limit of order of sale.
" 1891. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.
" 1892. Court may order the investment of money of the ward.

Sec. 1877. When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward, when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

Sec. 1878. When it appears to the satisfaction of the court or judge, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, or his ward being an insane married woman, and it is necessary for all the parties interested, that her dower right be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

Sec. 1879. If the estate be sold for the purposes mentioned in this Article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

Sec. 1880. If the estate be sold for the purposes of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court or judge.

Sec. 1881. To obtain an order of such sale the guardian must present to the District Court, or judge of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

Sec. 1882. If it appears to the court or judge from the petition that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward to sell the personal estate, or some part of it, the court or judge must order the sale to be made.

Sec. 1883. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least once a week for three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court or judge, in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published.

Sec. 1884. The court or judge, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of the next of kin, and of all other persons interested in the estate who oppose the application.

Sec. 1885. On hearing, the guardian may be examined on oath and witnesses' may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the court or judge, in the same manner and with like effect as in other cases provided for in this Title.

Sec. 1886. If any person appears and objects to the granting of any order prayed for under the provisions of this Article, and it appear to the court or judge that either the petition or the objection thereto is sustained, the court or judge may, in granting or refusing the order, award the costs to the party prevailing, and enforce the payment thereof.

Sec. 1887. If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part of it, should be sold, the court or judge may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

Sec. 1888. Every guardian authorized to sell real estate must before the sale give bond to the ward, with sufficient sureties to be approved by the court or judge, with condition to sell the same in the manner, and to account for the proceeds of the sale as provided for in this Chapter, and Chapter VII. of this Title.

Sec. 1889. All the proceedings under the petition of guardians for sales of property of their wards, giving notice, and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of this Title concerning the estates of decedents, unless otherwise specially provided in this Chapter.

Sec. 1890. No order of sale, granted in pursuance of this Article, continues in force more than one year after granting the same, without a sale being had.

Sec. 1891. All sales of real estate of wards, must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from date of sale, as in the discretion of the court or judge is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes and a mortgage on the real estate sold, with such additional security as the court or judge deems necessary and sufficient to secure the prompt payments of the amounts so deferred and the interests thereon.

Sec. 1892. The court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the court or judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein, and the court or judge may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require.

ARTICLE V.

NON-RESIDENT GUARDIANS AND WARDS.

Section 1895. Guardians of non-resident persons.
" *1896. Powers and duties of guardians appointed under preceding section.*
" *1897. Such guardians to give bonds.*
" *1898. To what guardianship shall extend.*
" *1899. Removal of non-resident ward's property.*
" *1900. Proceedings on such removal.*
" *1901. Sale of same.*
" *1902. Discharge of person in possession.*

Sec. 1895. When a person liable to be put under guardianship, according to the provisions of this Chapter, resides without this State and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the District Court of any county in which there is any estate of such absent person, for the appointment of a guardian, and if, after notice given to all interested, in such manner as such court or judge orders, by publication or otherwise, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed.

Sec. 1896. Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within this State, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this Chapter.

Sec. 1897. Every guardian must give bond to the ward in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this State.

Sec. 1898. The guardianship which is first lawfully granted of any person residing without this State extends to all the estate of the ward within this State, and excludes the jurisdiction of the District Court of every other county.

Sec. 1899. When the guardian and ward are both non-residents, and the ward is the owner of or entitled to property in this State which may be removed to another state or territory or foreign country, or sold without conflict with any restriction or limitation thereupon and without injuring the right of the ward thereto, such property may be removed to the state or territory or foreign country of the residence of the ward, or sold and the proceeds of the sale thereof removed to such state or territory or foreign country, upon the application of the district judge of the county in which the estate of the ward or the principal part thereof is situated.

Sec. 1900. The application must be made upon ten days notice to the resident executor, administrator, or guardian, if there be such, otherwise without notice, and upon such application the non-resident guardian must produce and file a certificate under the hand of the clerk or judge and seal of the court from which his appointment was derived, showing:

1. A transcript of the record of his appointment.
2. That he has entered upon the discharge of his duties.
3. That he is entitled by the laws of the state or territory or foreign country of his appointment to the possession of the estate of his ward, or must produce and file a certificate, under the hand of the clerk or judge and seal of the court having jurisdiction in the state or territory or foreign country of his residence, of the estate of persons under guardianships, or of the highest court of such state or terrritory or foreign country, showing that by the laws of such state or territory or foreign country, the applicant is entitled to the custody of the estate of his ward without the appointment of any court.

The said application shall also contain a description of the property of such ward, together with an estimate of its value.

Upon such application, unless good cause to the contrary is shown, the judge must make an order granting such guardian leave to take and remove the property of his ward to the state or territory or foreign country of his residence, or to sell the same as may be requested or prayed for in said application, which order shall be authority to such guardian to sue for and receive the property therein described in his own name, for the use and benefit of his ward.

Sec. 1901. Property authorized to be sold under the provisions of the preceding section may be sold at public or private sale with or without notice, as the order of the district judge may direct, and upon such terms as such order may prescribe, but before any sale thereunder the property must be appraised by three appraisers to be appointed by the judge granting such order either before or after the issuance of the order of sale, and that the property must not be sold for less than ninety per cent. of the appraised value thereof.

Upon making the sale of such property or any part thereof, the guardian shall make a report thereof to the judge, showing the person or persons to whom, and the price or prices for which the said property, or any part thereof, was sold. Thereupon the judge shall proceed to hear such report, and if the sale appears to have been fairly conducted, and the price or prices obtained appear to be the reasonable market value of the property sold, the judge shall make an order confirming such sale or sales, and directing a proper deed or deeds of real property, or a proper bill of sale or other transfer conveying the property sold to the purchaser or purchasers.

A certified copy of each order confirming the sale of real property must be recorded in the office of the county clerk of the county where such real property is situated. The guardian shall make and deliver to the purchaser or purchasers the deed or other conveyance authorized by the said order and in conformity thereto, and thereupon all right, title, interest and estate of such ward shall be fully vested in such purchaser or purchasers.

Any guardian mentioned in this and the preceding section may by power of attorney, executed and acknowledged in the manner provided by law for the execution and acknowledgment of conveyances of real property, empower and authorize any person capable in law of executing a power of attorney for the sale of real estate, as attorney in fact to do any or all of the things that the guardian himself might otherwise do, and in such case the acts and proceedings of such attorney in fact have the same force and effect as the acts and proceedings of such guardian.

Sec. 1902. Such order is a discharge of the executor or administrator, local guardian or other person in whose possession the property may be at the time the order is made, on filing with the court the receipt therefor of the foreign guardian of such absent ward.

ARTICLE VI.

GENERAL AND MISCELLANEOUS PROVISIONS.

Section 1905. Examination of persons suspected of defrauding wards or concealing property.
" *1906. Removal and resignation of guardian, and surrender of estate.*
" *1907. Guardianship, how terminated.*
" *1908. New bond, when required.*
" *1909. Guardian's bond to be filed. Action on.*
" *1910. Limitation of action on guardian's bond.*
" *1911. Limitation of action for the recovery of property sold.*
" *1912. More than one guardian of a person may be appointed.*
" *1913. Power of judge in chambers.*
" *1914. Provisions of Section 1204 apply to guardians.*

Sec. 1905. Upon complaint made to him by any guardian, ward, creditor or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled or conveyed away any of the money, goods, or effects, or any instrument in writing belonging to the ward or to his estate, the court or judge may cite such suspected person to appear before such court or judge and may examine and proceed with him on such charge in the manner provided in this Title with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent.

Sec. 1906. When a guardian appointed either by the testator or a court or judge becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the court or judge may, upon such notice to the guardian as the court or judge may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the court or judge may appoint another in the place of the guardian who resigns or was removed.

Sec. 1907. The marriage of a minor ward terminates the guardianship of the person of such ward, but not of the estate; and the guardian of an insane or other person may be discharged by the court or judge, when it appears, on the application of the ward or otherwise, that the guardianship is no longer necessary.

Sec. 1908. The court or judge may require a new bond to be given by a guardian whenever such court or judge deems it necessary, and may discharge the existing sureties for further liability, after due notice given as such court or judge may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

Sec. 1909. Every bond given by a guardian must be filed and preserved in the office of the clerk of the District Court, and in case of a breach of condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate.

Sec. 1910. No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if, at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

Sec. 1911. No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or, when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

Sec. 1912. The court or judge whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

Sec. 1913. All orders must be entered in the minutes of the court kept for probate proceedings. The provisions of this Title relative to the estates of decedents, so far as they relate to the practice in the District Court, apply to proceedings under this Chapter.

Sec. 1914. The provisions of Section 1204 are hereby declared to apply to guardians appointed by the court or judge, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds.

TITLE XIII.

PROCEEDINGS FOR DOWER.

Section 1930. Dower to be assigned widow.
" 1931. Widow may sue for dower if not set off.
" 1932. How widow may sue and proceedings.
" 1933. Trial of right contested.
" 1934. Guardians to be appointed for minors.
" 1935. Judgment for widows to be entered.
" 1936. Appointment of commissioners and oath.
" 1937. Duties of commissioners and reports.

Section 1938. If lands cannot be divided widow's interest may be appraised by a jury.
" *1939. Judgment for yearly value or gross sum.*
" *1940. Damages for withholding dower.*
" *1941. Writ of possession may be issued.*

Sec. 1930. It is the duty of the heirs at law, or other person in possession or having the next estate of freehold, or inheritance, in any lands or estate of which the widow is entitled to dower, to lay off and assign such dower as soon as practicable after the death of the husband of such widow.

Sec. 1931. If such heirs or other person do not within one month next after the decease of the husband, assign and set over to the widow to her satisfaction, her dower in and to all lands, tenements, and hereditaments, whereof by law she is or may be dowable, then such widow may sue for and recover the same in the manner hereinafter prescribed against such heirs or other person having the next immediate estate of freehold or inheritance, or tenant in possession, or other person or persons claiming rights or possession in said estate.

Sec. 1932. Every widow claiming dower may file her complaint in the District Court of the proper county, against the parties aforesaid, stating their names, if known, setting forth the nature of her claim and particularly specifying the lands, tenements, and hereditaments in which she claims dower, and praying that the same may be allowed to her, whereupon the clerk must issue a summons and the pleadings and proceedings must be as in other cases.

Sec. 1933. Where the right of the widow to dower is contested, the court must try the case or direct an issue for that purpose, as the circumstances may require.

Sec. 1934. When any of the parties defendant are minors and without guardians, the court must appoint guardians *ad litem* for such minors.

Sec. 1935. When the court adjudges that the widow is entitled to dower, it must be so entered of record, together with a description of the land out of which she is to be endowed.

Sec. 1936. The court must thereupon appoint three commissioners not connected with any of the parties by consanguinity or affinity, and entirely disinterested, each of whom must take the following oath: "I do solemnly swear that I will fairly and impartially allot and set off to A B, widow of C. D, her dower out of lands and tenements described in the order of the court for that purpose, if the same can be made consistent with the interest of the estate, according to the best of my judgment, so help me God;" which must be filed in the proceedings.

Sec. 1937. The commissioners, after being so sworn, must, as soon as may be, set off the dower by metes and bounds, according to the quantity and quality of all the lands, tenements and hereditaments described in said order, and make return in writing with the amount of their charges and expenses to the court, and the same being accepted and recorded, and a certified copy thereof recorded in the office of the county clerk of the county where the lands are situated, remain fixed and certain, unless such confirmation is set aside and reversed on appeal. The costs of such proceedings may be awarded in the discretion of the court.

Sec. 1938. If the commissioners report that the lands or other estate is not susceptible of division without great injury thereto, a jury must be impaneled to inquire of the yearly value of the widow's dower therein, and assess the same accordingly.

Sec. 1939. The court must thereupon render a judgment that there be paid to such widow as an allowance in lieu of dower, on a day therein named, the sum so assessed as the yearly value of her dower and the like sum on the same day in every year thereafter during her natural life. The widow may at any time consent to a gross sum to be paid to her for her dower in her deceased husband's estate, or the jury may find in lieu of a yearly allowance a gross sum to be paid to the widow and the court may award a judgment for the same.

Sec. 1940. Whenever in an action brought for the purpose, the widow recovers the dower in lands of which her husband died seized, she may also recover damages for the withholding of such dower; such damages shall be one-third part of the annual value of the mere profits of the land in which she so recovers her dower, to be estimated in an action against the heirs of her husband from the time of his death; and in actions against other persons, from the time of her demanding dower of such persons, but such damages must not be estimated for the use of any permanent improvements made after the death of her husband, by his heirs or any other person after claiming title to any lands.

Sec. 1941. In all cases where the report of the commissioners assigning dower is approved, the court must forthwith cause the widow to have possession by a writ directed to the sheriff for that purpose.

PART IV.

EVIDENCE.

Title I. General Principles.
" II. Kinds and Degrees of Evidence.
" III. Production of Evidence.
" IV. Effect of Evidence.
" V. Rights and Duties of Witnesses.
" VI. Evidence in Particular Cases and General Provisions.

Section 1958. Definition of evidence.
" 1959. Definition of proof.
" 1960. Definition of law of evidence.
" 1961. The degree of certainty required to establish facts.
" 1962. Four kinds of evidence specified.
" 1963. Several degrees of evidence specified.
" 1964. Primary evidence defined.
" 1965. Secondary evidence defined.
" 1966. Direct evidence defined.
" 1967. Indirect evidence defined.
" 1968. Prima facie evidence defined.
" 1969. Partial evidence defined.
" 1970. Satisfactory evidence defined.
" 1971. Indispensable evidence defined.
" 1972. Conclusive evidence defined.
" 1973. Cumulative evidence defined.
" 1974. Corroborative evidence defined.

Sec. 1958. Judicial evidence is the means sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Sec. 1959. Proof is the effect of evidence, the establishment of a fact by evidence.

Sec. 1960. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof.
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive;
3. For the production of legal evidence.
4. For the exclusion of whatever is not legal.
5. For determining in certain cases the value and effect of evidence.

Sec. 1961. The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind.

Sec. 1962. There are four kinds of evidence:

1. The knowledge of the court.

2. The testimony of witnesses.
3. Writings.
4. Other materal objects presented to the senses.

Sec. 1963. There are several degrees of evidence:

1. Primary and secondary.
2. Direct and indirect.
3. *Prima facie*, partial, satisfactory, indispensable and conclusive.

Sec. 1964. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.

Sec. 1965. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents.

Sec. 1966. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example, if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct.

Sec. 1967. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example, a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

Sec. 1968. *Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example, the certificate of a recording officer is *prima facie* evidence of a record, but it may afterward be rejected upon proof that there is no such record.

Sec. 1969. Partial evidence is that which goes to establish a detached fact, in series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute, by proof of other facts. For example, on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not afterward be connected with the fact in dispute.

Sec. 1970. The evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

Sec. 1971. Indispensable evidence is that without which a particular fact cannot be proved.

Sec. 1972. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

Sec. 1973. Cumulative evidence is additional evidence of the same character to the same point.

Sec. 1974. Corroborative evidence is additional evidence of a different character to the same point.

TITLE I.

GENERAL PRINCIPLES OF EVIDENCE.

Section 1977. One witness sufficient to prove a fact.
“ *1978. Testimony confined to personal knowledge.*
“ *1979. Testimony to be in presence of persons affected.*
“ *1980. Witness presumed to speak the truth.*
“ *1981. One person not affected by acts of another.*
“ *1982. Declarations of predecessor in title evidence.*
“ *1983. Declarations which are a part of the transaction.*
“ *1984. Evidence relative to third person.*
“ *1985. Declaration of decedent of pedigree.*
“ *1986. Declaration of decedent evidence against his successor in interest.*
“ *1987. When part of the transaction proved, the whole is admissible.*
“ *1988. Contents of writing, how proved.*
“ *1989. An agreement reduced to writing deemed the whole.*
“ *1990. Construction of language relates to place where used.*
“ *1991. Construction of statutes and instruments, general rule.*
“ *1992. The intention of the Legislature or parties.*
“ *1993. The circumstances to be considered.*
“ *1994. Terms to be construed in their general acceptation.*
“ *1995. Written words control those printed in a blank form.*
“ *1996. Persons skilled may testify to decipher characters.*
“ *1997. Of two constructions, which preferred.*
“ *1998. A written instrument construed as understood by parties.*
“ *1999. Construction in favor of natural right preferred.*
“ *2000. Material allegations only to be proved.*
“ *2001. Evidence confined to material allegations.*
“ *2002. Affirmative only can be proved.*
“ *2003. Facts which may be proved on trial.*

Sec. 1977. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

Sec. 1978. A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.

Sec. 1979. A witness can be heard only upon oath or affirmation and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine.

Sec. 1980. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility.

Sec. 1981. The rights of a party cannot be prejudiced by the declaration, act or omission of another, except by virtue of a particular relation between them; therefore proceedings against one cannot affect another.

Sec. 1982. Where, however, one derives title to real property from another, the declaration, act or omission of the latter, while holding the title in relation to the property is evidence against the former.

Sec. 1983. Where, also, the declaration, act or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction.

Sec. 1984. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties.

Sec. 1985. The declaration, act, or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible.

Sec. 1986. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

Sec. 1987. When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence.

Sec. 1988. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. Where the original has been lost or destroyed; in which

case the proof of the loss or destruction must first be made.

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.

3. When the original is a record or other document in the custody of a public officer.

4. When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute.

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in Subdivisions 3 and 4, a copy of the original or of the record must be produced; in those mentioned in Subdivisions 1 and 2, either a copy or oral evidence of the contents.

Sec. 1989. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings.

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section 1953, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

Sec. 1990. The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place.

Sec. 1991. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Sec. 1992. In the construction of a statute the intention of the Legislature, and in the construction of the instrument, the intention of the parties is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

Sec. 1993. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

Sec. 1994. The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.

Sec. 1995. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

Sec. 1996. When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language.

Sec. 1997. When the terms of an agreement have been intended in a different sense by different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

Sec. 1998. A written notice, as well as every other writing, is to be construed according to the ordinary acceptation of its terms. Thus, a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment, and the same refused, and that the holder looks for payment to the person to whom the notice is given.

Sec. 1999. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.

Sec. 2000. None but a material allegation need be proved.

Sec. 2001. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Colllateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it effects the credibility of a witness.

Sec. 2002. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the case of action is founded; nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

Sec. 2003. In conformity with the preceeding provisions, evidence may be given upon a trial of the following facts:

1. The precise fact in dispute.

2. The act, declaration, or omission of a party, as evidence against such party.

3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto.

4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death.

5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.

6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.

7. The act, declaration or omission forming part of a transaction, as explained in Section 1943.

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter.

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion of a question of science, art or trade, when he is skilled therein.

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of intimate acquaintanceship respecting the mental sanity of a person, the reason for the opinion being given.

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary.

12. Usage, to explain the true character of an act, contract or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation.

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts, engravings on rings, family portraits and the like, as evidence of pedigree.

14. The contents of a writing, when oral evidence thereof is admissible.

15. Any other facts from which the facts in issue are presumed or are logically inferable.

16. Such facts as serve to show the credibility of a witness, as explained in Section 1940.

TITLE II.

KINDS AND DEGREES OF EVIDENCE.

Chapter I. Knowledge of the Court.
" II. Witnesses.
" III. Writing.
" IV. Material Objects Presented to the Senses, Other Than Writings.
" V. Indirect Evidence.
" VI. Indispensable Evidence.
" VII. Conclusive and Unanswerable Evidence.

CHAPTER I.

KNOWLEDGE OF THE COURT.

Section 2005. Certain facts of general notoriety assumed to be true. Specification of such facts.

Sec. 2005. Courts take judicial notice of the following facts:

1. The true signification of all English words, and phrases and of all legal expressions.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive and judicial departments of this State and of the United States.

4. The seals of all the courts of this State and of the United States.

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States.

6. The existence, title, national flag, and seal of every State or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all cases these courts may resort for its aid to appropriate books or documents of reference.

CHAPTER II.

WITNESSES.

Section 2007. Witnesses defined.
" 2008. All persons capable of perceptions and communication may be witnesses.
" 2009. Persons who cannot testify.
" 2010. Persons in certain relations to parties prohibited.
" 2011. Judge or jury may be witnesses.
" 2012. When an interpreter to be sworn.

Sec. 2007. A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.

Sec. 2008. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in Section 1940.

Sec. 2009. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person.

Sec. 2010. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

Sec. 2011. The judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury.

Sec. 2012. When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned, who fails to attend at the time and place named in the summons, is guilty of contempt.

CHAPTER III.

WRITINGS.

Article I. Writings in General.
" II. Public Writings.
" III. Private Writings.

ARTICLE I.

WRITINGS IN GENERAL.

Section 2015. Writings, public and private.
" 2016. Public writings defined.
" 2017. All others private.

Sec. 2015. Writings are of two kinds:

1. Public; and,

2. Private.

Sec. 2016. Public writings are:

1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers,

legislative, judicial and executive, whether of this State, of the United States, of a sister State, or of a foreign country.

2. Public records, kept in this State, of private writings.

Sec. 2017. All other writings are private.

ARTICLE II.

PUBLIC WRITINGS.

Section 2020. Every citizen entitled to inspect any copy of public writings.
" *2021. Public officer bound to give copies.*
" *2022. Four kinds of public writings.*
" *2023. Laws written or unwritten.*
" *2024. Written laws defined.*
" *2025. Constitution and statutes.*
" *2026. Public and private statutes defined.*
" *2027. Unwritten law defined.*
" *2028. Books containing laws presumed to be correct.*
" *2029. Public seal authenticates a law or document.*
" *2030. Other evidence of laws of other States.*
" *2031. Recitals in statutes, how far evidence.*
" *2032. Judicial record defined.*
" *2033. Record, how authenticated as evidence.*
" *2034. Record of a foreign country, how authenticated.*
" *2035. Oral evidence of a foreign record.*
" *2036. Effect of a judgment upon rights in various cases.*
" *2037. Effect of other judicial orders, when conclusive.*
" *2038. Where parties are to be deemed the same.*
" *2039. What deemed adjudged in a judgment.*
" *2040. Where sureties are bound, principal is also.*
" *2041. Record of another state, its effect.*
" *2042. Record of a court of admiralty.*
" *2043. Effect of a foreign judgment.*
" *2044. Manner of impeaching a record.*
" *2045. The jurisdiction necessary in a judgment.*
" *2046. Manner of proving other official documents.*
" *2047. Public record of private writing evidence.*
" *2048. Entries in official books prima facie evidence.*
" *2049. Justice's judgment in other States, how proved.*
" *2050. Same.*
" *2051. Contents of other official certificates.*
" *2052. Provisions in relation to States apply to Territories.*
" *2053. Certificates of purchase prima facie evidence of ownership.*
" *2054. Entries made by officers or boards prima facie evidence.*

Sec. 2020. Every citizen has a right to inspect and take a copy of any public writings of this State, except as otherwise expressly provided by statute.

Sec. 2021. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing.

Sec. 2022. Public writings are divided into four classes:

1. Laws.
2. Judicial records.
3. Other official documents.
4. Public records, kept in this State, of private writings.

Sec. 2023. Laws, whether organic or ordinary, are either written or unwritten.

Sec. 2024. A written law is that which is promulgated in writing, and of which a record is in existence.

Sec. 2025. The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this State is therefore contained in its Constitution and statutes, and in the Constitution and statutes of the United States.

Sec. 2026. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

Sec. 2027. Unwritten law is the law not promulgated and recorded as mentioned in Section 2024, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and treatises of learned men.

Sec. 2028. Books printed or published under the authority of a sister State or foreign country, and purporting to contain the statutes, code, or other written law of such State or country, or proved to be commonly admitted in the tribunals of such State or country, as evidence of the written law thereof, are admissible in this State as evidence of such law.

Sec. 2029. A copy of the written law or other public writing of any State or country, attested by the certificate of the officer having charge of the original, under the public seal of the State or country, is admissible as evidence of such law or writing.

Sec. 2030. The oral testimony of witnesses, skilled therein, is admissible as evidence of the unwritten law of a sister State or foreign country, as are also printed and published books of reports of decisions of the courts of such State or country, or proved to be commonly admitted in such courts.

Sec. 2031. The recitals in a public statute are conclusive evidence of the facts recited, for the purpose of carrying it into effect, but no further. The recitals a in private statute are conclusive evidence between parties who claim under its provisions, but no further.

Sec. 2032. A judicial record is the record of official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.

Sec. 2033. A judicial record of this State, or of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or other person having the legal custody thereof. That of a sister State may be proved by the attestation of the clerk, and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

Sec. 2034. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court, or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul or consular agent of the United States in such foreign country.

Sec. 2035. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it.

2. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

Sec. 2036. The effect of a judgment or final order in an action or special proceeding before a court or judge of this State, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.

2. In other cases the judgment or order is, in respect to the

matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity; *Provided*, They have notice, actual or constructive, of the pendency of the action or proceeding.

Sec. 2037. Other judicial orders of a court or judge of this State, or of the United States, create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

Sec. 2038. The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.

Sec. 2039. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

Sec. 2040. Whenever pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding, and an opportunity at the surety's request to join in the defence.

Sec. 2041. The effect of a judicial record of a sister State is the same in this State as in the State where it was made; except that it can only be enforced here by an action or special proceeding, and except also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority.

Sec. 2042. The effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.

Sec. 2043. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows:

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing.

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact.

Sec. 2044. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

Sec. 2045. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.

Sec. 2046. Other official documents may be proved as follows:

1. Acts of the executive of this State, by the records of the State department of the State, and of the United States, by the records of the State department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by the order of the Legislative Assembly or Congress, or either house thereof.

2. The proceedings of the Legislative Assembly of this State or of Congress by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.

3. The acts of the executive, or the proceedings of the legislature of a sister State, in the same manner.

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a municipal corporation of this State, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such corporation.

6. Documents of any other class in this State, by the original, or by a copy certified by the legal keeper thereof.

7. Documents of any other class in a sister State, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the Secretary of State, judge of the Supreme Court, district, or county court, or mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original.

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with the certificate, under seal of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original.

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof.

Sec. 2047. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

Sec. 2048. Entries in public or other official books or records made in the performance of his dutyby a public officer of this State, or any other person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts stated therein.

Sec. 2049. A transcript from the record or docket of a justice of the peace of a sister State, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

Sec. 2050. There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court thereof, certifying that the person subscribing the transcript, was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.

Sec. 2051. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court.

Sec. 2052. The provisions of the preceding sections of this Article applicable to the public writings of a sister State, are equally applicable to the public writings of the United States or a Territory of the United States.

Sec. 2053. A certificate of purchase or of location of any lands in this State, issued or made in pursuance of any law of the United States or of this State, is *prima facie* evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

Sec. 2054. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is *prima facie* evidence of the facts stated in such entry.

ARTICLE III.

PRIVATE WRITINGS.

Section 2057. Private writings classified.
" *2058. Seal defined.*
" *2959. Manner of making it.*
" *2060. Effect of seal.*
" *2061. Execution of an instrument defined.*
" *2062. Compromise of a debt without seal good.*
" *2063. Subscribing witness defined.*
" *2064. Books, maps, etc., how far evidence.*
" *2065. Original writing to be proved or accounted for.*
" *2066. When in possession of adverse party, notice to be given.*
" *2067. Writings called for and inspected may be withheld.*
" *2068. Where there is a subscribing witness, the proof.*
" *2069. Other witnesses may also testify.*
" *2070. When evidence of execution not necessary.*
" *2071. Evidence of handwriting.*
" *2072. Allowed by comparison.*
" *2073. Same.*
" *2074. Entries of decedent's evidence in specified cases.*
" *2075. Copies of entries allowed.*
" *2076. Private writings acknowledged and certified.*
" *2077. Public records not to be carried about.*
" *2078. Certified copies of records evidence.*

Sec. 2057. Private writings are either:
1. Sealed; or,
2. Unsealed.

Sec. 2058. A seal is a particular sign, made to attest in the most formal manner, the execution of an instrument.

Sec. 2059. A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister State or foreign country, and there recognized as a seal, must be so regarded in this State.

Sec. 2060. There shall be no difference hereafter, in this State, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged, by a writing not under seal.

Sec. 2061. The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.

Sec. 2062. An agreement in writing without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

Sec. 2063. A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.

Sec. 2064. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are *prima facie* evidence of facts of general notoriety and interest.

Sec. 2065. The original writing must be produced and proved, except as provided in this Part. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as hereinbefore provided.

Sec. 2066. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.

Sec. 2067. Though a writing called for by one party is produced by the other, and it is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case.

Sec. 2068. Any writing may be proved either:

1. By any one who saw the writing executed; or,

2. By evidence of the genuineness of the handwriting of the maker; or,

3. By a subscribing witness.

Sec. 2069. If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

Sec. 2070. Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one mentioned in Section 2073, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

Sec. 2071. The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

Sec. 2072. Evidence respecting the handwriting may also be given by a comparison, made by the witness or jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge.

Sec. 2073. Where a writing is more than thirty years old, the comparisons may be made with writing purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

Sec. 2074. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as *prima facie* evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it.

2. When it was made in a professional capacity, and in the ordinary course of professional conduct.

3. When it was made in the performance of a duty specially enjoined by law.

Sec. 2075. When an entry is repeated in the regular course of business, one being copied from another or at or near the time of the transaction, all the entries are equally regarded as originals.

Sec. 2076. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment of proof of conveyances of real property, and the certificate of such acknowledgment or proof is *prima facie* evidence of the execution of the writing in the same manner as if it were a conveyance of real property.

Sec. 2077. The record of a conveyance of real property, or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court or judge, in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office.

Sec. 2078. Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, and every instrument authorized by law to be filed or recorded in the county clerk's office, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.

CHAPTER IV.

MATERIAL OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.

Section 2080. Material objects.

Sec. 2080. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, or character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court.

CHAPTER V.

INDIRECT EVIDENCE, INFERENCES AND PRESUMPTIONS.

Section 2083. Indirect evidence classified.
" *2084. Inference defined.*
" *2085. Presumption defined.*
" *2086. When an inference arises.*
" *2087. Presumptions may be controverted, when.*
" *2088. Specification of conclusive presumptions.*
" *2089. All other presumptions may be controverted.*

Sec. 2083. Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

Sec. 2084. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect.

Sec. 2085. A presumption is a deduction which the law expressly directs to be made from particular facts.

Sec. 2086. An inference must be founded:

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

Sec. 2087. A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption.

Sec. 2088. The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title ; but this rule does not apply to the recital of a consideration.

3. Whenever a party has, by his own declaration, act or omission intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

6. The judgment or order of a court, when declared by this Code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

7. Any other presumption which, by statute, is expressly made conclusive.

Sec. 2089. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong.

2. That an unlawful act was done with an unlawful intent.

3. That a person intends the ordinary consequence of his voluntary act.

4. That a person takes ordinary care of his own concerns.

5. That evidence willfully suppressed would be adverse if produced.

6. That higher evidence would be adverse from inferior, being produced.

7. That money paid by one to another was due to the latter.

8. That a thing delivered by one to another belonged to the latter.

9. That an obligation delivered up to the debtor has been paid.

10. That former rent or installments have been paid when a receipt for latter is produced.

11. That things which a person possesses are owned by him.

12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.

13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly.

14. That a person acting in a public office was regularly appointed to it.

15. That official duty has been regularly performed.

16. That a court or judge, acting as such, whether in this State or any other State or country, was acting in the lawful exercise of his jurisdiction.

17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.

18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them.

19. That private transactions have been fair and regular.

20. That the ordinary course of business has been followed.

21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration.

22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.

23. That a writing is truly dated.

24. That a letter duly directed and mailed was received in the regular course of the mail.

25. Identity of persons from identity of name.

26. That a person not heard from in seven years is dead.

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

28. That things have happened according to the ordinary course of nature and the ordinary habits of life.

29. That persons acting as co-partners have entered into contract of co-partnership.

30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

32. That a thing once proved to exist continues as long as is usual with things of that nature.

33. That the law has been obeyed.

34. That a document or writing more than thirty years old, is genuine when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published.

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the State or country, where the book is published, contains correct reports of such cases.

37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest.

38. The uninterrupted use by the public of land for a burial ground for five years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose.

39. That there was a good and sufficient consideration for a written contract.

40. When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules:

First—If both of those who have perished were under the age of fifteen years, the older is presumed to have survived.

Second—If both were above the age of sixty, the younger is presumed to have survived.

Third—If one be under fifteen and the other above sixty, the former is presumed to have survived.

Fourth—If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived. If the sexes be the same, then the older.

Fifth—If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.

CHAPTER VI.

INDISPENSABLE EVIDENCE.

Section 2092. *Indispensable evidence, what.*
" 2093. *To prove perjury and treason, more than one witness required.*
" 2094. *Will to be in writing.*
" 2095. *How revoked.*
" 2096. *Transfer of real property to be in writing.*
" 2097. *Last section not to extend to certain cases.*
" 2098. *Agreement not in writing, when invalid.*
" 2099. *Representation of credit by writing.*

Sec. 2092. The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts.

Sec. 2093. Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

Sec. 2094. A last will and testament, except a nuncupative will is invalid, unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given.

Sec. 2095. A written will cannot be revoked or altered otherwise than as provided in the Civil Code.

Sec. 2096. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust over or or power concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance, or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

Sec. 2097. The preceding section must not be construed to effect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

Sec. 2098. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof.

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2367, of the Civil Code.

3. An agreement made upon consideration of marriage, other than a mutual promise to marry.

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Sec. 2099. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

CHAPTER VII.

CONCLUSIVE AND UNANSWERABLE EVIDENCE.

Section 2101. Conclusive or unanswerable evidence.

Sec. 2101. No evidence is by law made conclusive or unanswerable, unless so declared by this Code.

TITLE III.

PRODUCTION OF EVIDENCE.

Chapter I. By Whom to be Produced.
" II. Means of Production.
" III. Manner of Production.

CHAPTER I.

BY WHOM TO BE PRODUCED.

Section 2103. Evidence to be produced, by whom.
" 2104. Writing altered, who to explain.

Sec. 2103. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

Sec. 2104. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.

CHAPTER II.

MEANS OF PRODUCTION.

Section 2107. Subpoena for witness, defined.
" 2108. Subpoena, how issued.
" 2109. Subpoena, how served.
" 2110. How, if witness be concealed.
" 2111. When a witness is compelled to attend.
" 2112. Person present compelled to testify.
" 2113. Disobedience, how punished.
" 2114. Forfeiture therefor.
" 2115. Warrant may issue to bring witness, when.

Section 2116. Contents of warrant.
" *2117. If witness be a prisoner, how brought.*
" *2118. On whose motion.*
", *2119. How examined.*

Sec. 2107. The process by which the attendance of a witness is required is by a subpoena. It is a writ or order directed to a person and requiring in his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents or other things under his control, which he is bound by law to produce in evidence.

Sec. 2108. The subpoena is issued as follows:

1. To require attendance before a court, or at a trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending.

2. To require attendance out of the court, before a judge, justice or other officer authorized to administer oaths or take testimony in any matter under the laws of this State, it is issued by the judge, justice or any other officer before whom the attendance is required.

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other State in the United States, or of any other district or county within this State, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge, justice of the peace in places within their respective jurisdiction; with like power to enforce attendance, and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein.

Sec. 2109. The service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person.

Sec. 2110. If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing a subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

Sec. 2111. A witness is not obliged to attend as a witness before any court, judge, or justice, or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

Sec. 2112. A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.

Sec. 2113. Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out.

Sec. 2114. A witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

Sec. 2115. In case of a failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

Sec. 2116. Every warrant of commitment, issued by a court, or officer pursuant to this Chapter, must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant to this Chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process by the District Court.

Sec. 2117. If the witness be a prisoner, confined in a jail or prison within this State, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a justice's court.

2. By a justice of the Supreme Court, or a judge of the District Court of the county where the action or proceeding is pending, if pending before a justice's court, or before a judge or other person out of court.

Sec. 2118. Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

Sec. 2119. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

CHAPTER III.

MANNER OF PRODUCTION.

Article I. Mode of Taking the Testimony of Witnesses.
" II. Affidavits.
" III. Depositions.
" IV. Manner of Taking Depositions Out of the State.
" V. Manner of Taking Depositions in the State.
" VI. General Rules of Examination.

ARTICLE I.

MODE OF TAKING THE TESTIMONY OF WITNESSES.

Section 2122. Testimony, in what mode taken.
" 2123. Affidavit defined.
" 2124. A deposition defined.
" 2125. Oral examination defined.
" 2126. Deposition, how taken.

Sec. 2122. The testimony of a witness is taken in three modes:

1. By affidavit.
2. By deposition.
3. By oral examination.

Sec. 2123. An affidavit is a written declaration under oath, made without notice to the adverse party.

Sec. 2124. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

Sec. 2125. An oral examination is an examination in presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

Sec. 2126. Depositions must be taken in the form of questions and answers, and the words of the witness must be written down, unless the parties agree to a different mode.

ARTICLE II.

AFFIDAVITS.

Section 2129. Affidavits and depositions, how taken.
" 2130. Evidence of publication, what.
" 2131. Where filed.
" 2132. Affidavits to be used in this State, before whom may be taken in this State.

Section 2133. If made in another State of the United States, before whom taken.
" *2134. If made in a foreign country, before whom taken.*
" *2135. Certificate of the clerk, if taken before a judge of a court out of this State.*

Sec. 2129. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other cases expressly permitted by some other provision of this Code.

Sec. 2130. Evidence of the publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made.

Sec. 2131. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case, the original affidavit, or a copy thereof, certified by the judge of the court or clerk having it in custody, is *prima facie* evidence of the facts stated therein.

Sec. 2132. An affidavit to be used before any court, judge or officer of this State, may be taken before any judge or clerk of any court, or any justice of the peace, county clerk or notary public in this State.

Sec. 2133. An affidavit taken in another State of the United States, to be used in this State, may be taken before a commissioner appointed by the Governor of this State to take affidavits and depositions in such other State, or before any notary public in another State, or before any judge or clerk of a court of record having a seal.

Sec. 2134. An affidavit taken in a foreign country to be used in this State, may be taken before an ambassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country.

Sec. 2135. When an affidavit is taken before a judge of a court in another State, or in a foreign country, the genuineness of the signature of the judge, the existence of the court and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

ARTICLE III.

DEPOSITIONS.

Section 2137. Deposition, when used.
" 2138. Testimony of a witness out of the State, when taken.
" 2139. In the State, when taken.

Sec. 2137. In all cases other than those mentioned in Section 2129, where a written declaration under oath is used, it must be a deposition as prescribed by this Code.

Sec. 2138. The testimony of a witness out of the State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding at any time after a question of fact has arisen therein.

Sec. 2139. The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons or appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding, or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2. When the witness resides out of the county in which his testimony is to be used.

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

6. When the witness is the only one who can establish facts or a fact material to the issue; *Provided*, That the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause.

ARTICLE IV.

MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.

Section 2142. Testimony of witness out of the State taken upon commission issued under seal, upon notice. To whom to issue.
" 2143. Proper interrogatories may be prepared, or may be waived by the parties.
" 2144. Authorities and duties of commissioner.
" 2145. Trial, when postponed for reason of non-return of commission.
" 2146. Depositions, by whom used.

Sec. 2142. The deposition of a witness out of this State may be taken upon the commission issued from the court, under the seal of the court, upon an order of the court, or a judge thereof, on the application of either party, upon five days' previous notice to the other. If issued to any place within the United States, it may be directed to any person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace, or commissioner, selected by the court or judge issuing it. If issued to any country out of the United States, it may be directed to a minister, embassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties.

Sec. 2143. Such proper interrogatories, direct and cross, as the respective parties may prepare to be settled, if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode the examination may be without written interrogatories.

Sec. 2144. The commission must authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope, directed to the clerk of the court or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

Sec. 2145. A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

Sec. 2146. The deposition mentioned in this Article may be used by either party on the trial or other proceeding, against any other party giving or receiving the notice, subject to all just exceptions.

ARTICLE V.

MANNER OF TAKING DEPOSITIONS IN THIS STATE.

Section 2149. Depositions may be taken before a judge, etc., upon notice to the adverse party.
" *2150. Manner of taking depositions. May be used by either party on the trial.*
" *2151. When deposition excluded.*
" *2152. A deposition once taken may be read at any time.*
" *2153. Deposition in this State to be used in other States.*
" *2154. How to procure witness upon commission.*
" *2155. How, if no commission.*
" *2156. Deposition, how taken.*

Sec. 2149. Either party may have the deposition taken of a witness in this State, in either of the cases mentioned in Section 2139, before a judge or officer authorized to administer oaths, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless for a cause shown, a judge by order prescribe a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice.

Sec. 2150. Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail, or by some safe private means of conveyance; and thereupon such deposition may be used by either party upon the trial or proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under Subdivisions 2, 3, and 4, of Section 2134, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness.

Sec. 2151. Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to attend the taking thereof, or that the taking was not in all respects fair.

Sec. 2152. When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties upon the same subject, and is then deemed the evidence of the party reading it.

Sec. 2153. Any party to an action or special proceeding in a court, or before a judge, of a sister State, may obtain the testimony of a witness residing in this State, to be used in such action or proceeding, in the cases mentioned in the next two sections.

Sec. 2154. If a commission to take such testimony has been issued from the court, or a judge thereof, before which such action or proceeding is pending, on producing the commission of a judge of the District Court, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place.

Sec. 2155. If a commission has not been issued, and it appear to a judge of the District Court, or to a justice of the peace, by affidavit satisfactory to him:

1. That the testimony of the witness is material to either party.
2. That a commission to take the testimony of such witness has not been issued.
3. That, according to the law of the State where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding; he must issue his subpoena requiring the witness to appear and testify before him at a specified time and place.

Sec. 2156. Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that State requires.

ARTICLE VI.

GENERAL RULES OF EXAMINATION.

Section. *2159.* *Order of proof, how regulated.*
" *2160.* *Witness not under examination may be excluded.*
" *2161.* *Court may control mode of interrogation.*
" *2162.* *Direct and cross-exawination defined.*
" *2163.* *Leading question defined.*
" *2164.* *When witness may refresh memory from notes.*
" *2165.* *Cross-examination, as to what.*
" *2166.* *Party producing witness, how far may impeach his credit.*
" *2167.* *Witness, how examined. When re-examined.*
" *2168.* *How impeached.*
" *2169.* *Same.*
" *2170.* *Evidence of good character, when allowed.*
" *2171.* *Writing shown to witness may be inspected by adverse party.*

Sec. 2159. The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.

Sec. 2160. If either party requires it, the judge may exclude from the court room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

Sec. 2161. The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be; but, subject to this rule, the parties may put such pertinent and legal questions as they see fit. The court, however, may stop the production of further evidence upon a particular point when the evidence upon it is already so full as to preclude reasonable doubt.

Sec. 2162. The examination of a witness by the party producing him is denominated the direct examination, the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct.

Sec. 2163. A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

Sec. 2164. A witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. But in such case the writing must be produced and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

Sec. 2165. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.

Sec. 2166. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 2169.

Sec. 2167. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion.

Sec. 2168. A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony.

Sec. 2169. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

Sec. 2170. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action until the character of such party or witness has been impeached, or unless the issue involves his character.

Sec. 2171. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness.

TITLE IV.

EFFECT OF EVIDENCE.

Section 2173. Jury judges of effect of evidence, but to be instructed on certain points.

Sec. 2173. The jury subject to the control of the court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

2. They are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.

3. That a witness false in one part of his testimony is to be distrusted in others.

4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution.

5. That in civil cases the affirmative of the issue must be

proved, and when the evidence is contradictory the decision must be made according to the preponderance of the evidence; that in criminal cases guilt must be established beyond reasonable doubt.

6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered would be viewed with distrust.

TITLE V.

RIGHTS AND DUTIES OF WITNESSES.

Section 2175. Witness bound to attend when subpoenaed.
" 2176. Witnesses bound to answer questions.
" 2177. Right of witnesses to protection.
" 2178. Witnesses protected from arrest when attending, or going or returning.
" 2179. Arrest to be made void, and party making arrest liable, etc.
" 2180. To make affidavit if arrested.
" 2181. Court to discharge witness from arrest.

Sec. 2175. A witness, served with a subpoena, must attend at the time appointed, with any papers under his control required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed.

Sec. 2176. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

Sec. 2177. It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

Sec. 2178. Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

Sec. 2179. The arrest of a witness, contrary to the preceding section, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with a subpoena, for the damages sustained by him in consequence of the arrest.

Sec. 2180. An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption, and make an affidavit stating:

1. That he has been served with a subpoena to attend as a witness before a court, officer or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,

2. That he has not thus been served by his own procurement with the intention fo avoiding arrest.

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena. The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

Sec. 2181. The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of Section 2178. If the court have adjourned before the arrest, or before application for discharge, a judge of the court may grant the discharge.

TITLE VI.

EVIDENCE IN PARTICULAR CASES, AND MISCELLANEOUS AND GENERAL PROVISIONS.

Chopter I. Evidence in Particular Cases,
" *II. Proceedings to Perpetuate Testimony.*
" *III. Administration of Oaths and Affirmations.*
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CHAPTER I.

EVIDENCE IN PARTICULAR CASES.

Section 2184. An offer equivalent to payment.
" *2185. Whoever pays entitled to receipt.*
" *2186. Objections to tender must be specified.*
" *2187. Rules for construing description of lands.*
" *2188. Compromise offer of no avail.*
" *2189. In an action for divorce, admission not sufficient.*

Sec. 2184. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

Sec. 2185. Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

Sec. 2186. The person to whom a tender is made, must at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objections be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward.

Sec. 2187. The following are the rules for construing the descriptive part of a conveyance of real property when the construction is doubtful and there are no other sufficient circumstances to determine it.

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

2. When permanent and visible, or ascertained boundaries or monuments, are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.

3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title.

5. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low water mark are included in the conveyance.

6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars.

Sec. 2188. An offer of compromise is not an admission that anything is due.

Sec. 2189. In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce.

CHAPTER II.

PROCEEDINGS TO PERPETUATE TESTIMONY.

Section 2192. Evidence may be perpetuated.
" *2193. Manner of application for order.*
" *2194. Notice of time and place to be given.*
" *2195. Manner of taking the deposition.*
" *2196. Depositions to be filed.*
" *2197. When the evidence may be produced.*
" *2198. Effect of the deposition.*

Sec. 2192. The testimony of a witness may be taken and perpetuated as provided in this Chapter.

Sec. 2193. The applicant must produce to a judge of the District Court a petition, verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this State, and, in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at any time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this State, must be personally served, and if unknown, such notice must be served on the clerk of the county where the property affected by such evidence is situated, or the judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order the clerk of the court to whom the deposition must be returned when taken.

Sec. 2194. The person appointed by the judge to take the depositions is authorized, if a resident of this State, on receiving a copy of the order of the judge, and of the notice prescribed in the last section, with proof of its personal service or publication—or, if a resident without the State, on receiving the commission mentioned in the next section, with proof of like service of publication of the notice—to take the deposition of the witness named in the order of the judge, or in the commission, or, if more than one witness is thus named, of such of them as appear before him, at the time designated, and the taking of the same may be continued from time to time.

Sec. 2195. The examination must be by question and answer, and if the testimony is to be taken in another State, it must be taken upon a commission to be issued by the judge allowing the examination, under the seal of the court of which he is judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the clerk of the court designated in the order of the judge allowing the examination, who shall file the same when received. The judge allowing the examination shall file with the clerk the order for the examination, the petition on which the same was granted, with proof of service of the order and notice.

Sec. 2196. The petition and order and papers filed by the judge, as provided in Section 2195, or a certified copy thereof, are *prima facie* evidence of the facts stated therein to show compliance with the provisions of this Chapter.

Sec. 2197. If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable by reason of age or other infirmity to give their testimony, the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attended at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination.

Sec. 2198. The deposition so taken and read in evidence has the same effect as the oral testimony of the witness and no other, and every objection to the witness or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

CHAPTER III.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

Section 2200. Judicial and certain officers authorized to administer oaths.
" *2201. Form of ordinary oath to witness.*
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Sec. 2200. Every court, every judge or clerk of any court, every justice and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

Sec. 2201. An oath or affirmation, in an action or proceeding, may be administered as follows, the person who swears, or affirms, expressing his assent when addressed in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue, (or matter) pending between ——— and ———, shall be the truth, the whole truth, and nothing but the truth, so help you God."

Sec. 2202. Whenver the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with, or in addition to the usual form of administration, which, in his opinion, is more solemn or oblgiatory, the court may in its discretion, adopt that mode.

Sec. 2203. When a person is sworn who believes in any other than the Christian religion, he may be sworn accordingly to the peculiar ceremonies of his religion, if there be any such.

Sec. 2204. Any person who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm (or declare)," etc., as in Section 2201.

CHAPTER IV.

GENERAL PROVISIONS.

Section 2207. Questions of fact to be decided by the jury, and the evidence addressed to them.
" 2208. Questions of law addressed to the court.
" 2209. Questions of fact by court or referee.
" 2210. Moneys paid into court.

Sec. 2207. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code.

Sec. 2208. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this Code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

Sec. 2209. The provisions contained in this part of the Code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee or other officer.

Sec. 2210. Whenever moneys are paid into or deposited in court, the same shall be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it with the county treasurer, to be held by him subject to the order of the court. The treasurer shall keep each fund distinct, and open an account with each. Such appointment shall be filed with the county treasurer, who shall exhibit it, and give to each person applying for the same a certified copy of the same. It shall be in force until a revocation in writing is filed with the county treasurer, who shall thereupon write "revoked" in ink across the face of the appointment.

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DEFINITIONS AND GENERAL PROVISIONS.

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Sec. 2215. This Code takes effect at twelve o'clock noon on the first day of July, 189—.

2216. No part of it is retroactive, unless expressly so declared.

Sec. 2217. In this State there is no common law in any case where the law is declared by the Code or the statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the Code or other statutes, the common law shall be the law and rule of decision.

Sec. 2218. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions, and all proceedings under it, are to be liberally construed with a view to effect its objects and to promote justice.

Sec. 2219. The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.

Sec. 2220. No action or proceeding commenced before this Code takes effect, and no right accrued, is effected by its provisions.

Sec. 2221. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code.

Sec. 2222. Holidays within the meaning of this Code are: Every Sunday, the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday of September, the twenty-fifth day of December, every day on which an election is held throughout the State, and every day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving, or holiday. If the first day of January, the twenty second day of February, the thirtieth day of May, the fourth day of July or the twenty-fifth day of December, fall upon a Sunday, the Monday following is a holiday.

Sec. 2223. All other days than those mentioned in the next preceding section are business days for all purposes.

Sec. 2224. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

Sec. 2225. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

Sec. 2226. Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

Sec. 2227. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeding section, are to be construed according to such peculiar and appropriate meaning or definition.

Sec. 2228. Words used in this Code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration; and every oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose;" signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness.

The following words also have in this Code the signification attached to them in this section, unless otherwise apparent from the context.

1. The word "property" includes both real and personal property.

2. The words "real property" are co-extensive with lands, tenements, and hereditaments, and possessory title to public lands in this State.

3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt.

4. The word "year" as used in this Code means calendar year, and the word "month" means a calendar month unless otherwise expressed. Fractions of year are to be computed by the number of months, thus half a year is six months. Fractions of a day are to be disregarded in computations which include more than one day and involve no questions of priority.

5. The word "writ" signifies an order or precept in writing, issued in the name of the State, or of a court or judicial officer, and the word "process" a writ issued in the course of judicial proceedings.

6. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories; and the words "United States" may include the District and Territories.

7. The word "will" includes codicils.

8. The word "several," as used in this Code in relation, means two or more.

9. The words "third persons," as used in this Code, include all who are not parties to the obligation or transaction concerning which the phrase is used.

10. Usage, within the meaning of this Code, is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby, existing at the place where the obligation is to be performed, and either known to the parties or so well established, general and

uniform, that they must be presumed to have acted with reference thereto.

11. The words "usual" and "customary," as used in this Code, mean "according to usage."

Sec. 2229. Notice is:

1. Actual, which consists of express information of a fact; or,

2. Constructive, which is imputed by law.

Sec. 2230. Every person who has actual notice of circumstances, sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might be informed of such facts.

Sec. 2231. Every law, unless a different time shall be prescribed therein, shall commence and take effect throughout this State on, and not before, the twentieth day after the day of its final passage.

Sec. 2232. The words "final passage," as used in the preceding section, shall be held to mean the enactment into law of a bill which has passed the Legislative Assembly, either with or without the approval of the Governor, as provided in Section 12, of Article VII., of the Constitution.

Sec. 2233. The county clerk of any county is also clerk of the county commissioners and *ex officio* recorder. Any duty imposed by law upon such officer, either as county clerk, clerk of county commissioners, or as recorder, shall be performed by the county clerk, and any official acts performed or certified by the county clerk shall be as valid and effectual as if performed and certified to by him as clerk of the county commissioners, or as recorder.

Sec. 2234. Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for the purpose by the Constitution and statutes of this State.

Sec. 2235. These remedies are divided into two classes:

1. Actions; and,

2. Special proceedings.

Sec. 2236. An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

Sec. 2237. Every other remedy is a special proceeding.

Sec. 2238. Actions are of two kinds:

1. Civil; and,

2. Criminal.

Sec. 2239. A civil action arises out of:

1. An obligation.

2. An injury.

Sec. 2240. An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from:

1. Contract; or,
2. Operation of law.

Sec. 2241. An injury is of two kinds:

1. To the person; and,
2. To property.

Sec. 2242. An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it.

Sec. 2243. Every other injury is an injury to the person.

Sec. 2244. A civil action is prosecuted by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong.

Sec. 2245. The Penal Code defines and provides for the prosecution of a criminal action.

Sec. 2246. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

Sec. 2247. No statute, law or rule is continued in force because it is consistent with the provisions of the Code on the same subject; but in all cases provided for by this Code, all statutes, laws and rules heretofore in force in this State, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated.

This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this Code provided; nor does it affect any private statute not expressly repealed.

Sec. 2248. Subject to the provisions of the next preceding section, and Sections 2220 and 2221, the following statutes and parts of statutes are hereby repealed, to-wit: Section 1 to 830, inclusive, First Division, called the Code of Civil Procedure; Sections 1 to 563, inclusive, Second Division, called the Probate Practice Act; Sections 102 to 116, inclusive, Fifth Division, General Laws; also Section 162; also Sections 202 to 208, inclusive; also Sections 487, 488 and 489; also Sections 685, 686 and 687; also Sections 821 to 828, inclusive; also Sections 981 and 982; also Section 1203; also Sections 1287 to 1293, inclusive; also Sections 1294 and 1295; also Sections 1297 to 1306, inclusive; also Sections 1434 to 1338, inclusive; also Sections 1495 to 1507, inclusive; also Sections 1556 to 1559, inclusive; also Sections 1977 to 1982, inclusive; also Section 1990; also Sections 2051 to 2055, inclusive, of the Compiled Statutes.

Also an Act to amend Section 253, Second Division, Compiled Statutes, approved September 14th, 1887.

Also an Act to regulate trial practice in District Courts in relation to exceptions and instructions, approved September 13th, 1887.

Also an Act to amend an Act entitled an Act to amend an Act relating to liens of mechanics, approved March 9th, 1887, approved September 14th, 1887.

Also an Act in relation to motion for new trial, approved September 14th, 1887.

Also an Act to amend and authorizing the appointment of stenographers by the District Court, approved March 10th, 1887, approved September 14th, 1887.

Also an Act to amend Section 102, Chapter IX., Fifth Division, Compiled Laws, relating of admission to practice of attorneys at law, approved February 13th, 1889.

Also an Act authorizing the conveyance of dower rights of insane married women, approved March 13th, 1889.

Also an Act to amend Section 272, Second Division, Compiled Statutes, entitled Probate Practice Act, approved March 12th, 1889.

Also an Act to amend Section 229, of the Probate Practice Act, approved March 14th, 1889.

Also an Act to amend Section 255, First Division, Compiled Statutes, relating to the formation of the jury, approved March 2d, 1889.

Also an Act relating to the drawing of juries, etc., approved March 14th, 1889.

Also an Act entitled an Act to amend Chapter 82, Compiled Laws, relating to liens and to add thereto a subdivision of Section 1394, approved March 14th, 1889.

Also an Act to amend Sections 41 and 44, Chapter III, First Division, Compiled Laws, relating to limitation of actions, approved March 9th, 1889.

Sec. 2249. This Act, whenever cited, enumerated, referred to, or amended, may be designated simply as the "Code of Civil Procedure," adding when necessary, the number of the section.

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